A
REPORT TO
THE HONOURABLE
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MINISTER OF LABOUR

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# RECOMMENDATIONS FOR LABOUR LAW REFORM

Submitted by the
Sub-committee of Special Advisers
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# Table of Contents


Background 5
General Considerations 7
The Process 13

## Part 1
**Introductory Provisions** 17
Definitions 18
Purposes Of The Code 18
Continuing Review Of The Code 18

## Part 2
**Rights, Duties And Unfair Labour Practices** 19
Rights Of Employer And Employee 20
Union Membership Standards 21
Duty Of Fair Representation 22
Secondary Boycott And Non-Affiliation Agreements 22
Religious Objections 23

## Part 3
**Acquisition And Termination Of Bargaining Rights** 25
Certification 26
Common Employer And Successorship 27
Dependent Contractors 28
Raids 29
Sectoral Certification 30
Revocation Of Bargaining Rights 33

## Part 4
**Collective Bargaining Procedures** 35
First Collective Agreement Settlement 36
Alteration Of Terms And Conditions Of Employment Upon Expiry Of The Collective Agreement 37
Ongoing Consultation 38

## Part 5
**Strikes, Lockouts And Picketing** 41
Strikes And Lockout Votes And Notice 42
Picketing 43
Continuation Of Benefits 43
Replacement Worker Prohibition 43

## Part 6
**Essential Services** 45

## Part 7
**Mediation And Disputes Resolution** 47

## Part 8
**Arbitration Procedures** 49
Expedited Arbitration 50
Related Arbitration Matters 52

## Part 9
**Labour Relations Board** 53
Evidence 54
Offices Of The Board 54
Publication 54
Interim Orders 54
Reconsideration Of Labour Relations Board Decisions 55
Declaratory Opinion 55
Registrar 55

## Part 10
**Miscellaneous** 57
Ombudsman 58
Construction Industry 58
Fishing Industry 59

## Appendices
**Appendix 1 Proposed Draft Labour Relations Code**
**Appendix 2 Secondary Boycott Agreements**
**Appendix 3 Sectoral Certification**
**Appendix 4 Picketing**
**Appendix 5 Replacement Worker Prohibition**

# Report

IN FEBRUARY 1992, THE MINISTER of Labour appointed a Committee of Special Advisors with a broad mandate to recommend an overall industrial relations strategy for the Province of British Columbia. This strategy was to

> *"....[address] the promotion of harmonious and stable labour/management relations to ensure that the Province maintains and enhances its competitive position in the world market place."*

A Sub-Committee of Special Advisors, consisting of John Baigent, Vince Ready and Tom Roper was appointed:

> *"[To] review the Industrial Relations Act and bring forward recommendations for change having regard for the need to create fair laws which will promote harmony and a climate conducive to the encouragement of investment."*

One other item in the mandate of the larger committee touched on the mandate of the Sub-Committee. The larger committee had been directed to make recommendations for improving processes for resolving disputes during the term of a collective agreement. The Sub-Committee coordinated its recommendations with those emanating from the parallel Sub-Committee of Special Advisors (Marie Decaire and Cleta Brown) and has reached consensus in this area.

The mandate of the Sub-Committee can be better understood in the context of the recent history of the current **Industrial Relations Act**.

# Background

CONTEMPORARY LABOUR legislation in British Columbia commenced with the **Labour Code of British Columbia Act** enacted in November 1973. That legislation reflected the labour relations philosophy that had been enunciated in 1968 by the Federal Task Force on Labour Relations (The "Woods Task Force"). The 1973 **Labour Code** was considered innovative and progressive both in British Columbia and across the country. The 1973 legislation centralized the regulation of labour legislation in an administrative tribunal designed to exercise its considerable power with the consensus of those who were the subject of its jurisdiction. The degree of success achieved by the **Labour Code** was largely the result of the process by which it was developed and the calibre of the Labour Relations Board appointees who administered it. To some, the **Labour Code** was a model piece of legislation establishing a proper balance between management and labour while, at the same time, protecting the rights of the individual employee. To others, the **Code** was viewed as pro-labour, shifting the balance of power to unions in a way which differentiated B.C. from other jurisdictions. The 1973 **Labour Code** differed from previous British Columbia labour legislation in that it was more comprehensive and was designed to offer extensive support to the collective bargaining process. As well, the legislation removed the primary jurisdiction for the control of picketing from the civil courts to the Labour Relations Board. The removal of labour disputes from the courts was complemented with a labour relations philosophy that required the new Board to address the underlying causes of labour disputes. Mediated settlements were encouraged.

The 1973 statute was not significantly changed by the new Government which came into power in 1976. Between 1973 and 1984 changes to the statute tempered somewhat the rights of trade unions and increased those of employers. But the format of the original 1973 legislation remained largely intact.

In 1984 major changes were made to the **Labour Code**. Those changes followed province-wide strikes ("Operation Solidarity") which occurred after the introduction of a series of statutes curbing the rights of public sector unions. The **Labour Code Amendment Act**, 1984 introduced major changes to the **Labour Code**. The 1984 legislation dispensed with certification of trade unions on the basis of signed membership cards, the system which had been in place for more than 40 years. Employees who signed membership cards in unions were required to confirm their support in secret ballot votes. A related amendment removed from the statute provisions which allowed a union to represent employees on a sectoral or geographic basis where the majority of employees within a sector supported the union and a majority of the employers consented to the application. In a parallel change, the right to apply for decertification was extended to employers by allowing them to apply after two years without employees in the bargaining unit - a provision which was to have significant consequences in the construction industry. The 1984 legislation also attempted to address picketing problems that had arisen in Province-wide labour disputes in the pulp industry in 1983. The 1973 **Labour Code** had allowed striking employees to picket other operations of the same employer in the Province, subject to a discretionary right in the Labour Relations Board to restrain such picketing.

The introduction of the secret ballot vote into British Columbia labour legislation constituted a departure from the norm in Canadian law where union support had traditionally been assessed on the basis of signed membership

cards. The new 1984 provisions in this area mirrored American legislation where certification votes are the norm. Along with the secret ballot vote came the inevitable pre-vote campaigning. While the statute still retained prohibitions against employer interference in the certification process, after the introduction of the vote the rate of unfair labour practices by employers during organization campaigns increased dramatically. The rate of new certification dropped by approximately 50%.

The most recent changes to the legislation came in 1987 with the proclamation of Bill19 and the enactment of the **Industrial Relations Act**. These amendments brought mixed and strong reaction. Labour saw the changes, introduced under the banner of individual freedoms, as designed to enable employers to rid themselves of unions. To them, the legislation appeared to be based on a simple premise: unions were inconsistent with a "competitive market economy" and their rights should be curtailed. While no one seriously attempted to defend Bill 19 as balanced legislation, some employers expressed opposition to certain parts of the legislation which invested significant power in the Commissioner to intervene in collective bargaining. Apart from the substantive changes which Bill 19 brought, there was general dissatisfaction with the process by which the legislation was implemented. Suffice to say, few today see Bill 19 as the product of meaningful consultation or as an attempt to achieve an appropriate level of consensus between labour and management.

Bill 19 introduced a host of changes. The name of the statute and the tribunal that administered it were changed to the **Industrial Relations Act** and the Industrial Relations Council. The tribunal was directed to administer mediation services which had previously been under the jurisdiction of the Ministry of Labour. The Chairman of the former Board was replaced with a Commissioner who presided over two Divisions - Adjudication and Dispute Resolution. Extensive powers of intervention into private and public sector disputes were given to the Commissioner, and an array of new processes and options were available to the Commissioner to foreclose the use of economic sanctions. Decertification was further facilitated and significant changes made to the provision dealing with common employers and successorship. Some negotiated rights were rendered illegal and eliminated from existing collective agreements. The 1984 amendments relating to picketing had been narrowly interpreted by the Labour Relations Board to permit some picketing at locations shared with other employers. The new legislation confined picketing to the places where striking employees worked under the direction of their employers, where the work was integral and a substantial part of the employer's operation. Common site picketing was curtailed as was the picketing of allied employers. The rights of an individual to opt out of a trade union were increased and restraints were put on internal union discipline.

Shortly after the **Industrial Relations Act** was proclaimed organized labour announced a boycott of the new legislation and of the Industrial Relations Council. The boycott continued until the election of the current government in the fall of 1991.

# General Considerations

SINCE THE 1973 **Labour Code**, the economy of the Province has experienced the upswing of the 1970's, the downturn of the 1980's and the struggle to pull out of global recession in the 1990's. In this regard B.C. is not alone.

Not only have economic fortunes changed over the last twenty years, but so too has the way business is carried on. As never before, business is competing in global markets. In doing so it must also respond to other societal imperatives such as concerns for the environment. It faces demands from not only low wage economies but also from industrialized nations where technology and new work processes have been maximized by management and labour to achieve both productivity and a high standard of living.

At the same time that markets are globalizing, the workplace is changing rapidly. Women now constitute a large component of the workforce. Demographics tell us that the supply of labour is diminishing, causing employers to adjust their management practices to attract and retain skilled employees. The service sector is expanding with a resulting increase in part time and often temporary employment.

The significant economic restructuring and workplace changes which are now under way present challenges to unions as they do to employers. Unions have been forced to deal with technological change and workplace reorganization in a way that is responsive to the needs of their members. In addition, unions are faced with the reality of declining membership. They must contend with those who do not recognize them as legitimate participants in the workplace.

Implicit in the Sub-Committee's mandate to review the **Industrial Relations Act** is a consideration of the continuing validity of the collective bargaining model in 1992. That consideration is prompted by two realities of the 1990's. It is clear that trade barriers are disappearing rapidly and that Canadian workers are now competing on world markets with lower paid and often unorganized workers. Industrial relations systems in which collective bargaining flourished are being transformed by technology and demographics. The traditional manufacturing base in which unions thrived consisting of large industrialized plants in urban areas is being replaced by small service-based industries amenable to relocation and redeployment. Those sectors of the economy growing most rapidly are those which have had little experience with collective bargaining - small businesses and the service industry where the workforce is generally better educated, younger and predominantly female.

The statistical information is revealing. In British Columbia in 1991 over 90% of workers in business services, real estate companies, financial institutions, insurance companies and retail trade are non-union. More than 85% of the workers in restaurants and bars fall into the same category (**Statistics Canada** and **B.C. Labour Directory**, 1991). These are the fastest growing sectors of the economy and the large percentage of jobs in these areas fall to adult women and part-time youth. As a result, private sector industries with high unionization rates are today often exclusively male workplaces while industries with less than 20% unionization rates are predominantly staffed by women or part-time workers.

Size of firm is also a significant variable affecting the rate of unionization. The smaller the workforce the more likely that workers in it will not have collective bargaining. A small workplace is today eight times less likely to be organized than a large firm in the same industry. At the same time, small businesses are the fastest growing sector of the economy. These fast growing service-oriented enterprises typically have a preponderance of women in their workforces, and the absence of collective bargaining makes it more difficult to address the wage gap between men and women.

In Western Europe trade union influence has remained stable and the rate of unionization has in fact increased marginally over the past 20 years. In the last 20 years in the United States union membership of non-agricultural workers as a percentage of the total workforce has declined from 31% to 17%. There are predictions that the percentage will decline to less than 10% by the end of the century. In Canada the percentage of workers represented by unions has remained more constant over the last ten years at approximately 35-37% of the work force. But that constancy is somewhat deceptive because it reflects the large number of public sector employees to whom collective bargaining rights have been extended over the past 20 years. In British Columbia, union density fell from 45.6% in 1983 to 38.8% in 1991 (**B.C. Labour Directory**, 1991).

Contemporary theorists put forward different explanations for the decline of trade union influence in the United States. Weiler, in **Governing the Workplace, The Future of Labor and Employment Law** (Harvard University Press, 1990), puts the explanations into two categories: the lack of appeal of collective bargaining to workers and sustained resistance on the part of employers to unionization. As to the first category, Weiler points out that unions enjoyed broad public approval in the '50's which declined sharply by the 1980's. This, coupled with major changes in the demography of the workforce, has resulted in workers questioning whether industrial based trade unionism and collective bargaining are capable of meeting the needs of today's workforce.

> *"Whereas collective bargaining has largely been concentrated among male blue-collar workers employed in a large factory environment, most of the growth in the labour force has taken place among female white-collar workers in office and service jobs, where employees traditionally enjoy a more personal, less structured relationship with their employer. It is not surprising that an institution developed to meet the needs of one kind of worker in the factory would prove unappealing to quite another kind of worker in an office."*
>
> **Governing the Workplace, The Future of Labor and Employment Law** (Harvard University Press, 1990, at page 107)

The other category of explanation identified by Weiler is employer resistance to union representation. Weiler notes that employers have employed two strategies of resistance: union "substitution" and union "suppression". The first strategy involves the employer providing employees with working conditions that traditionally have been won through collective bargaining, such that employees would find union representation to be unnecessary. The second strategy involves the utilization of tactics to pressure employees not to become certified or tactics designed to avoid

a collective agreement once a union has won bargaining rights.

Other commentators have also concluded that the factors contributing to the decline of unionism are varied. Marshall ("Unions and Competitiveness", **Empowering Workers in a Global Economy**, 1991) identifies one of the most important determinants of union strength in the United States as the attitude of U.S. employers: "... who seem to be more hostile to unions than their counterparts in other industrialized countries". He argues that employer opposition to unionism has been a major factor in the inability of unions to achieve certifications. However, Marshall goes on to point out that the decline in union strength is not due entirely to opposition from employers, but is also related to "structural shifts in the economy, workforce changes, weak enforcement of public policies, and factors associated with the union themselves".

Canadian legislation has for the last 50 years encouraged collective bargaining by workers. Recently, Madame Justice Wilson of the Supreme Court of Canada, explained the rationale for that policy:

> *"...collective bargaining is a mechanism by which individual employees come together and form a union to represent their interests. The whole purpose of unionization is to strengthen the position of these employees in order to offset the countervailing power of employers. Rather than simply enacting legislation aimed solely at protecting individual workers by curtailing and controlling employer abuses (e.g. minimum wage, occupational health and safety, and workers' compensation legislation), government established our current regime of collective bargaining. The purpose of this system is also to curb the excesses of the common law of the employment relationship and to thereby assuage industrial tensions. This is achieved, not through legislative protectionism, but rather through the promotion of the self-advancement of working people."*
>
> **Lavigne v. Ontario Public Service Employees Union et al**
> (1991) 81 D.L.R. (4th) 545 at p. 607

While collective bargaining provides a balance of power in the workplace, the traditional model of collective bargaining has been questioned in academic circles because of its tendency to generate rule-bound contracts with rigid classification structures, pay systems and work restrictions responsive to a "scientific management" philosophy based on mass production, where workers perform discrete functions under close supervision. The criticism asserts that traditional forms of collective bargaining have "narrowed the scope of worker participation to merely securing a network of protective constraints on management action (while failing to satisfy) the desire of present-day workers for broader influence on their jobs and on the enterprise."

While there are those who advocate that the present system of collective bargaining is incapable of meeting the needs of the present-day worker, the prevalent opinion is otherwise. That is not to say that the present system must not change. The fact that collective bargaining was capable of accommodating the shift from craft-based to industrial work organization should indicate that it is capable of accommodating the expansion of the service and technology sectors.

Most contemporary writers acknowledge the importance of worker involvement in the enterprise. Not only is employee involvement essential from the perspective of worker satisfaction, it is also necessary if a business is to maintain the flexibility required to be competitive (Weiler and Marshall, **op. cit.** and Kochan, **Industrial Relations Research and Labour Policy: Canada and the U.S. at the Crossroads**, 1992). While recognizing the imperative of employee involvement in work place issues, the consensus prevails that unionization is not inconsistent with that objective and that collective bargaining is capable of addressing that imperative.

In the first instance society must protect the rights of workers to organize. There is little point in developing models where collective bargaining can be more responsive if we do not first protect the right of employees to freely decide to engage in collective bargaining. Labour legislation must ensure that workers' rights to join trade unions may be exercised without interference and, if trade union representation is selected, our legislation must then ensure that the workplace encourages cooperation and flexibility.

The focus of the enlightened workplace today is on the employee. The organization of work and management practices must allow employees to realize their own potential and contribute in a way that maximizes job satisfaction. Unionization is consistent with that goal and indeed can provide employees with the collective will to bring about meaningful workplace participation. That is not to say that the current approach to collective bargaining has, in all cases, produced the type of relationship required for the future.

Our point is that union representation can provide employees with a vehicle to achieve a relationship in the work place that is conducive to the individual interests of the employees and the interests of the employer as well as the interests of the public at large.

In an increasingly global marketplace British Columbians are forced to compete with emerging countries whose wage rates are often low. Competition in world markets can be enhanced by adopting lower wages or by increasing productivity and efficiency. Most western countries and many of those in direct competition with British Columbia enterprises have rejected the concept of a low wage strategy as a route to enhanced competitiveness. Commentators have noted that such a strategy implies lower and more unequal incomes with dire consequences for social and political institutions. By contrast, a high wage strategy is feasible and sustainable only with increased productivity and ingenuity in the work place. This is an achievable goal as is evident from the success of the Japanese and the Western Europeans whose wage rates equal or exceed those paid in North America. A climate favourable to collective bargaining is inconsistent with a low wage strategy but should enhance a high wage/high productivity approach. Emerging studies on the subject indicate that higher union wage rates are offset by higher productivity levels among organized workers. A review of econometric evidence on the subject by two Harvard economists concluded:

> *"Modern quantitative analysis of productivity in organized and unorganized establishments and sectors offer striking new evidence on what unions do to productivity. This work in general suggests that productivity is higher in the presence of unions than in their absence."*
>
> (Freeman & Medoff, **What Do Unions Do?** 1984, at page 165)

Another recent study of the impact of unions and industrial relations concludes:

> *"Evidence regarding unions and productivity and costs is incomplete. There are a few general studies and a limited set of industry studies. These studies provide no evidence that unions per se reduce productivity: the majority of studies indicate that unions are associated with more efficient production."*
>
> (Belman, **Unions, the Quality of Labor Relations and Firm Performance**, 1991, at page 55)

Closer to home, Bruce Gajerski, an Edmonton-based statistical analyst was recently quoted in the Globe & Mail as follows:

> *"In the United States, more restrictive labour legislation has created low-wage ghettos in many regions. In some states, minimum wages are less than $2 an hour. In others, no minimum wage law exists. Compounding the situation has been the introduction of right-to-work laws in 21 states ....*
>
> *Median weekly earnings in the United States were $475 for union workers and $372 for non-union workers in 1989, a 34% difference.*
>
> *Similar differences in earnings exist here. A Statistics Canada study released in 1991 found average weekly occupational earnings in 1987 to be $508 for union members and $356 for non-union workers.*
>
> *The overall conclusion to the analysis (that union establishments are more productive than non-union firms) is that the legislating of right-to-work laws may serve as an incentive to attract investment, but productivity and income levels will be restrained. To achieve higher earnings, higher unionization rates are necessary."*

If British Columbia is to successfully compete in world markets it must find ways to enhance the productivity of its workplaces. At issue is how labour legislation can assist that objective.

We are of the view that the collective representation of employees by trade unions continues to be a socially desirable institution. That being the case, we must consider why that institution has declined. We previously outlined, in broad terms, the reasons put forward for the phenomenon: employer opposition to unionization and a perception that traditional collective bargaining is not conducive to the modern workplace.

Labour legislation should be responsive to both of these concerns. It should provide the mechanism by which employees can obtain union representation without being subjected to unlawful interference. But facilitating the ability of employees to unionize will not, of itself, respond to the second concern. Collective bargaining must be seen by employees, and by employers, as being relevant to and supportive of the kind of workplace which employees and employers seek today. If collective bargaining is seen as being incapable of addressing issues such as work flexibility, employee involvement, work redesign and so on, then the demand for unionism on the part of employees will decline and the impetus for employers to avoid unionization will increase.

Therefore, while labour legislation should encourage the practice and procedure of collective bargaining and provide the necessary legal protection to those who seek it, it must also ensure that the institution of collective bargaining remains viable and fluid. To that end, it should encourage a more cooperative, co-determinative approach to workplace issues.

Our mandate directs us to consider laws which will "promote harmony and a climate conducive to the encouragement of investment". Labour legislation is, of course, only one factor in the attraction of investment to the Province - but an important one. There are several ways that labour legislation can contribute to the attraction of investment. First, labour legislation must be perceived as fair by the employer and worker community, and by the general public. Second, because of the underlying premise in collective bargaining legislation that acceptable compromises are to be achieved by economic pressure, work stoppages and picketing are inevitable. In an economy featuring hierarchical integration of enterprises, the use of economic sanctions has the potential of dramatically expanding the focus of a labour dispute. In an integrated economy such as ours, workplace disputes must be confined as much as possible to those whose interests are directly affected. Third, it is important to avoid the dramatic swings in the nature of labour legislation that have characterized British Columbia labour legislation over the last 20 years. Investment and cooperation in the workplace are both long term propositions that require a secure legislative base. It is important that there be a process for an annual public reporting on existing legislation by a joint labour management committee. Such a process would provide a non-partisan method of identifying changes that may be necessary in future legislation. More importantly, it would allow for ongoing incremental development of the law.

# The Process

IT IS AGAINST THAT BACKGROUND that this Sub-Committee began the task of searching for the balance — for a statutory framework that would foster a different relationship and facilitate the achievement of common goals while acknowledging the different interests of labour and management.

We recognize, immediately, that there is no such thing as an absolute balance or fulcrum in labour legislation. In labour relations, balance is determined by perception, not objective calculation. Whether balance has been achieved depends entirely on the perspective of the evaluator. The best one can hope to accomplish in recommending labour law reform is that the legislation will be seen as being generally fair, promoting the legitimate goals and protecting the legitimate interests, from a societal perspective, of those it seeks to regulate.

The Sub-Committee attempted to consult with as wide a segment of the public as possible in preparing its recommendations. Initially, the Sub-Committee travelled to Eastern Canada and met with representatives of labour and management in Ontario and Quebec. Meetings were also arranged with Government officials and persons familiar with provincial and federal legislation. The Sub-Committee also met with officials from New Zealand and Australia to discuss the legislation emerging in those jurisdictions.

In applying ourselves to this task we attempted to consult broadly and determine whether a consensus could be achieved on some, if not all, areas under consideration. We embarked on this process with no preconceived ideas as to the issues we should consider. We asked that any issues or concerns be identified to us. In response to a public invitation we received 296 written submissions. We also toured the Province, visiting 11 different cities and towns, conducting public meetings at which we heard from 203 individuals representing trade unions, employers and other groups or individuals simply setting out their own personal views. The issues raised were wide ranging and touched on almost every aspect of the employment relationship.

At the risk of oversimplification, the public consultation process resulted in submissions which staked out opposing positions. Employers generally advocated no change to the legislation, pointing to relative labour relations peace over the last five years. Unions generally presented a case for major reform which would see a wholesale change to existing sections of the **Act**. Individuals sought to preserve and enhance their individual freedoms where they were seen to conflict with the rights of unions or employers. Notwithstanding the disparity of the positions being advanced, there were some common themes.

First, there was general agreement that whatever came out of the review process, it was imperative that broad consultation occur. Perhaps unlike any other type of legislation, labour laws have to have the support of the labour relations community and such support can only occur if the community has some say in the shape of the legislation.

Second, there was general recognition that the relationship between employers and unions had to change. Labour articulated this in terms of the need for unions to be recognized by management, government and society generally as legitimate institutions having a central role to play in the work place. Management said that the existing relationship was too adversarial and that unions would have to change their approach to

representation; in essence, to co-operate more in work place reorganization and work practices. While there was consensus that labour/management relations needed to be overhauled (although there was no consensus on the reason underlying the problem), few ideas were advanced as to how the legislation might accomplish this transformation.

Third, both management and labour were in agreement that the system of dispute resolution during the term of a collective agreement must be improved. The current arbitration system is seen as being too slow, too expensive and too legalistic.

Fourth, it was conceded by those involved in essential service industries, that the process of designating essential services could be improved to minimize the time and cost involved.

Finally, there was general agreement that the existing Part 8.1 of the **Act** should be reworked to realign the authority of the tribunal and the powers of the Minister of Labour in the area of intervention in collective bargaining. There is a shared belief that intervention in free collective bargaining should be minimized to the extent possible but that, where necessary, the power to intervene should repose in the Minister.

Although unions and management generally contended for the polarized positions noted above, there was the recognition by representatives of both parties that in the end properly balanced legislation is desirable. While some employers advocated minimal tinkering, others saw the need for more substantive changes, particularly in areas where labour and management had common concerns. Equally, while many unions advocated wholesale change, others recognized the difficulties created by dramatic swings in a legislative framework designed to foster secure, enduring relationships.

Labour legislation should provide a vehicle by which labour and management can work together to meet the challenges created by the changes that are occurring in our workplaces and economy. As will be seen from our proposals, we believe that the legislation should attempt to refocus the parties away from many of the traditional flashpoints of confrontation. So it is that our recommendations concerning union certification reflect a presumption that membership in a union truly reflects the wishes of employees to become involved in collective bargaining. Similarly, we have put a high priority on developing less costly and more timely ways of resolving workplace disputes. Our recommendations focus on mediation and facilitation as opposed to binding intervention, thereby assisting the parties to find their own way to resolve their differences. In that same vein, we propose a joint consultation provision to encourage parties, with the assistance of facilitators, to forge a new relationship to not only resolve differences but to find common ground to achieve mutual gains for business and labour. We believe that the legislation should place more onus on labour and management to resolve their differences without third party intervention or supervision. Our recommendations are designed to provide a piece of legislation which will *assist* rather than regulate and thus minimize those opportunities for confrontation to occur.

As we toured the Province, we spoke with members of local Chambers of Commerce which primarily represent small to mid-size businesses throughout the Province. We were struck by the pervasive concern raised in their oral and written submissions that their employees might unionize and by their concern for the restrictions which they believe a collective agreement would impose on their ability to compete.

The changes which we are proposing will no doubt facilitate the ability of employees to unionize. How then can it be said that we have addressed concerns expressed by the small to mid-size business community? We believe that changes which we have recommended in the Purposes provision, the consultation provision and elsewhere in the **Code** will send a message that trade unions must be sensitive to the needs of business in an ever-changing global economy. The legislation anticipates and encourages trade unions to forge collective bargaining relationships with small to mid-size businesses by meeting the unique and emerging challenges prevalent in this environment. The legislation we are recommending should assist the trade unions in dispelling the oft expressed fear of small to mid-size businesses that unionization of employees is negative for those businesses by allowing the parties to tailor solutions and agreements to individual and unique problems which arise in small to mid-size business.

We strongly believe that government can, and should, play a role in assisting the parties to adapting to change and in resolving their differences through mediation and facilitation. It is no understatement to say that the economic future of the Province is dependent, to a large degree, on the ability of labour and management to work together to ensure that workers can maintain and enhance their standard of living and that business, both small and large, can maintain and enhance their competitive position in the world economy. An investment by government in a changed relationship will pay dividends not only for labour and management but for all the citizens of the Province. By assisting the parties, government will exercise its responsibility for protecting the public interest. The effective resolution of all types of labour relations disputes is high on the public agenda.

As stated previously, labour legislation in this Province, and in North America generally, is premised on an adversarial relationship. The right to engage in collective bargaining, backed up by the power to invoke economic sanctions necessarily pits labour against management. We believe that, because there will always be a divergence of interests between labour and capital, the continuation of an adversarial component to the legislation is necessary. However, we also believe management and labour must engage in a more fluid and adaptable relationship than that envisaged by the traditional bargaining model, to achieve work place change and improvements on an ongoing basis that will be to the mutual benefit of the employer and employees and the Province.

The substantive changes we recommend to the existing legislation are set out in the following sections of our report. Those recommendations are extensive and substantial; they are also unanimous. There are four exceptions.

Achieving unanimity on the vast majority of issues was a difficult task. It required a great deal of compromise and debate among your advisors. We signal that fact because of our firm conviction and advice that successful labour legislation must recognize the legitimate concerns of all sectors of the community. There are aspects of our recommendations which will disappoint the employer community and others which will disappoint the trade union community. We firmly believe that the recommendations achieve an overall balance. The recommendations reflect those compromises which are necessary to achieve balanced legislation and, in our view, are also consistent with the direction in our mandate to recommend fair labour laws.

Because our recommendations are extensive and involve structural changes to the existing legislation, we have refrained from recommending piecemeal amendments to the existing legislation. Instead we have drafted a new **Labour Code** which is attached as Appendix 1 of this report.

In the pages that follow we outline the major changes we are proposing and our reasons for those changes. There are other, less significant, changes which are not discussed, but which are largely self-evident in comparing our draft **Code** with the present legislation. In other cases the changes are simply grammatical or intended to make the statute gender neutral.

There are four issues on which we are not unanimous. On two of those issues our report reflects a majority view; on the other two, we have provided options for your consideration. The two dissenting views and the options are set out in an Appendix following the report and proposed legislation.

# Part 1

# Introductory Provisions

# 1

## Definitions

WE ARE RECOMMENDING A change in the name of the legislation from the **Industrial Relations Act** to the **Labour Relations Code** and a change in the name of the Industrial Relations Council to the Labour Relations Board. The new name of the statute is intended to convey that the legislation should be a code of conduct. We have recommended an extensive re-ordering of the provisions of the statute to reflect what we consider to be a more logical format.

We have also recommended new titles for administrators of the legislation, which more accurately reflect their role. We recommend amendments to the definition of "employee" to streamline the exclusions. While we have deleted the exclusion relating to the confidential planning or advisory position, we believe that the rationale for exclusion under that provision is covered in the general exclusion relating to the performance of management functions. We have also recommended an amendment to the definition of "employers" to more accurately reflect the relationship between an employer and a dependent contractor. A change in the definition of "unit" would allow a single employee to form a bargaining unit.

We recommend amending the definition of "picket" to delete the reference to "watching and besetting" as the phrase does not describe the act of picketing in contemporary terms.

## Purposes of the Code

We recommend a substantially revised Purposes section and have suggested that it be relocated in the **Code** to highlight the fact that it provides the governing principles of the legislation.

The new Purposes section reflects the substantive changes which we recommend elsewhere. It deals with union organizing and certification procedures, identifies a new relationship of cooperative participation during the life of a collective agreement, acknowledges that labour disputes should be confined to the parties involved and that the public interest must be protected, and highlights the importance of mediation as the preferred dispute resolution mechanism.

Together, these purposes are the foundation for the substantive recommendations contained in this report.

## Continuing Review of the Code

We recommend that the government put into place a mechanism for an ongoing review of the labour legislation with a view to ensuring that any future changes to the law are both incremental and measured. Few things are more destructive to stable labour relations than dramatic swings in the balance the statute attempts to foster between employers and unions. In the 19 years that have passed since the 1973 **Labour Code** employers and employees in unions have had to contend with major changes in the legislation that were perceived as involving major readjustments to the rights of either one side or the other. That process simply encourages a pendulum-like approach that is inimical to sound labour relations. We recommend that you appoint a committee of special advisors to undertake a continuing review of the legislation and to advise you on an annual basis of problems that may be occurring under the legislation. In this way incremental changes will be encouraged while the engagement of advisors, representative of both employer and union interests, should ensure that future amendments are perceived to be the product of multilateral consultation.

# Part 2

# Rights, Duties and Unfair Labour Practices

# 2

IN CONJUNCTION WITH THE CHANGES which we are recommending to the certification procedures, we are also recommending changes to the existing Part 1, to be renamed "Rights, Duties and Unfair Labour Practices".

## Rights of Employer and Employee

Any substantial alteration in any employee's job security can have a chilling effect on an organizing drive. It is therefore important that complaints that an employee has been discharged, suspended, transferred or laid-off for reason of his or her union involvement should be determined as soon as possible.

Quick adjudication is in the best interests of the employee involved, the union and the employer. If an unfair labour practice has occurred, it is in the union's interest to have the situation remedied quickly so that the effects of the violation on any organizing drive or ongoing collective bargaining will be minimized. If no unfair labour practice has been committed, it is in the employer's interest to "clear the air" quickly if employees hold the belief that the employer has acted contrary to the **Code**. To that end, we have recommended amendments to the existing Section 2(5) to include references to suspensions, transfers or lay-offs and to shorten the time periods for adjudication. We recommend that the legislation direct that hearings be commenced within three days and that a decision be rendered within two days of the conclusion of the hearing.

We have also recommended the reinstatement of a general unfair labour practice provision which existed in previous legislation. That Section provides that "a person shall not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become, refrain from becoming or continue or cease to be a member of a trade union." This general prohibition had been in our labour legislation since 1973 but was amended in 1982 to apply only to trade unions. We see no reason for that restricted application, and therefore recommend the reinstatement of the provision as a general proscription.

As mentioned in the introduction of our report, one of the major impediments to union organization is employer opposition. That opposition can easily manifest itself during an organizing campaign when employer representatives express inappropriate opinions on the question of unionization. We accept the view that employers have a legitimate interest in whether their employees organize for the purpose of collective bargaining. On the other hand, we believe that employers must maintain a circumspect position during an organizing campaign to ensure that employees are able to freely choose whether or not they wish to belong to a trade union.

The existing **Act** is somewhat confusing in that it contains two provisions which address the subject of free speech: Section 2(3) and Section 3(3)(g). Those Sections overlap each other to a large degree. We propose a single provision recognizing the right of a person to communicate to an employee a statement of fact or opinion reasonably held relating to an employer's business.

The same type of concerns arise with respect to the conduct of a trade union, particularly in a system of certification based on support

evidenced by membership cards. Unions must have the right to sell themselves to prospective members, so long as salesmanship does not cross the line into coercion or intimidation.

We recommend three amendments to ensure an absence of improper employer interference during a certification drive. First, we recommend that during a certification drive employees be afforded "proper cause" protection from termination, discharge, suspension or lay-off. When an employee's employment is compromised during a union organizing drive, an employer will be required to establish - in an expedited process - that its action was taken as a result of improper conduct by the employee. Second, we recommend an amendment to the provision found in Section 8(4)(e) of the **Industrial Relations Act** which allows for automatic certification of a union in situations where an employer's unfair labour practice has frustrated the aspirations of the employees for certification. The current legislation allows for certification if, by reason by the employer's unfair labour practice, the "true wishes of the employees cannot be ascertained". This is a confusing standard since the usual effect of an unfair labour practice is not to render employees wishes inscrutable, but rather, to influence them improperly against certification. We recommend that the legislation be amended to allow the Board to certify a trade union if the Board is of the opinion that, in the absence of the employer's unfair labour practice, the union "would likely have obtained the requisite support" for certification. There is some precedent for this approach in decisions of the Labour Relations Board. It means that an employer who is prepared to improperly interfere with his employees' rights to join the trade union runs the risk that its conduct will be visited with the very results the employer sought to avoid. And finally, we are recommending an amendment that will preclude employers from interfering in an employee's "selection" of a union. This will bring the British Columbia legislation into line with other Canadian jurisdictions.

## Union Membership Standards

We recommend modifications of those provisions of the current legislation relating to union membership, introduced in 1984 and 1987, which restrict the manner in which union security clauses operate. British Columbia legislation has always permitted a trade union to negotiate provisions in a collective agreement requiring employees to maintain membership in the trade union as a condition of employment. That provision was effectively eliminated in 1987 with the introduction of amendments that prohibited a union from enforcing a union security clause as long as employees tendered an amount equivalent to dues to the union. One result of this amendment was to remove from unions any effective way of enforcing legitimate union policies adopted by a majority of the membership. The **Industrial Relations Act** also allows the Industrial Relations Council to set aside any internal union discipline which, in the Council's view, is not fair and reasonable. Prior to 1984 union discipline and membership standards (as opposed to representation of workers which is covered under separate "fair representation" provisions) could only be challenged in court proceedings.

While we consider it fundamental that unions should have the right to govern themselves according to rules adopted by the majority of

# 2

proceedings in court are often not a realistic alternative for persons who feel aggrieved by a decision of their union. We recommend that the Labour Relations Board be authorized to review union discipline and membership in limited circumstances. We recommend that the statute specifically prohibit imposition of any penalty on a member of a trade union because a member has refused to participate in activity prohibited under the **Code** or if the action taken against the individual amounts to discriminatory conduct by the union. We also recommend amendments that explicitly recognize the right of individuals to the application of the principles of natural justice in disputes arising under a union constitution. Subject to those limitations we recommend that union security clauses be enforceable and that the internal affairs of a union be subject only to the general laws of the Province.

## Duty of Fair Representation

The changes which we have recommended to the duty of fair representation provision simplify the core provision of the existing legislation and repeal other aspects of the statute added by Bill 19 which, in our view, are unwarranted. We are also recommending a new procedure for the adjudication of unfair representation complaints. Our purpose in doing so is to provide for the expeditious resolution of these complaints without requiring the parties to incur the costs of a full exchange of submissions, or a hearing, where those procedures are unnecessary. Our concern is that unions, employers and the complainant are often forced to expend considerable amounts of time and financial resources in circumstances where the complaint may not be justified. The ability to avoid unnecessary costs is a desirable objective in itself. Unless the tribunal can quickly adjudicate duty of fair representation complaints, the potential of protracted fair representation proceedings can adversely affect the resolution of disputes between a trade union and an employer. It is not uncommon for a trade union today to proceed with a grievance arbitration, where it might otherwise not have done so, to avoid the cost of defending a fair representation challenge, even though that challenge may be unmeritorious. Simply stated, it may be less expensive and more expeditious for a trade union to simply run a case through arbitration rather than defend an unmeritorious fair representation complaint. Accordingly, the *process* by which duty of fair representation complaints are adjudicated can have a very real negative impact on the labour relations between an employer and a trade union and on the settlement of grievances. Our recommendation would provide a process by which the Board could effectively adjudicate fair representation complaints without requiring submissions, or holding hearings, in every case.

## Secondary Boycott and Non-Affiliation Agreements[1]

We recommend the repeal of Sections 4.1 and 9.1 of the **Industrial Relations Act**. Section 4.1 prevents trade unions and employers from entering into "secondary boycott agreements" (e.g. an agreement that requires an employer to purchase only "union made" supplies) or an agreement where a union and employer agree, for example, that work which is contracted out must be performed by unionized employees. Such agreements are permissible in all other

[1] *Tom Roper disagrees with this recommendation. See Appendix 2.*

Canadian jurisdictions and, until the enactment of Bill 19, were common in British Columbia.

Sections 4.1 and 9.1 were enacted as part of Bill 19 and operated to remove from collective agreements provisions which had been freely negotiated by the parties and which, in the absence of Bill 19, were in conformity with Canadian laws. In the result, unions that had presumably given up other benefits in collective bargaining or gone on strike to obtain the protection afforded by these provisions had them arbitrarily removed from their collective agreements.

Quite apart from the essential unfairness in the way Sections 4.1 and 9.1 were enacted, the provisions themselves are inconsistent with a fundamental premise of collective bargaining — that the parties themselves are entitled to settle their own bargain subject only to the general law of the land. There is no reason to render illegal an agreement between two parties simply because it appears in a collective agreement if that agreement would not be illegal in any other setting. That is what Section 4.1 and 9.1 do.

Nor is there any social justification for insisting that trade unions are to be prevented from assisting each other by entering into agreements that require employers to deal only with other unionized employers. In the final analysis that is how they help themselves. As Mr. Justice Seaton of the British Columbia Court of Appeal observed in a case involving union security clauses in the construction industry,

> *"It might be said that in the short run the plasterer is not helping himself when he takes steps to support the carpenters' union, but in the long run he is taking the essential step. Only cooperation will safeguard the unions and their members. To do something for the purpose of helping another union with the ultimate object of helping oneself, in my view, is not unlawful."*
>
> **Canadian Pacific Railway Company v Teamsters and Others**
> (1975) W.W.R. 392 and 344)

We see no reason for restricting the rights of trade unions and employers to enter into agreements that seek to protect the legitimate interests of either party.

## Religious Objections

B.C. labour legislation has historically contained a religious conscience provision similar in wording to sections which exist in other labour legislation across Canada. Until recently, an exemption from mandatory trade union membership was granted only where the applicant could demonstrate that his or her religious convictions or beliefs were inconsistent with membership in a trade union. However, more recently the Industrial Relations Council held that exemption would be granted where a person's religious convictions or beliefs were inconsistent with the policies of, or positions taken by, a particular trade union, even though the applicant was not opposed to trade union membership generally. We recommend an amendment to the religious exemption provision to ensure that its original intent is maintained. In our opinion, exemption from union membership otherwise required by a collective agreement should obtain only where the individual, because of religious conviction

or belief, objects to joining trade unions, generally. Exemptions should not obtain where the individual does not object to membership in a trade union, but rather objects to membership in a particular trade union because of that union's policies or objectives. We have retained that provision in the existing statute which provides that, where an exemption is granted, an amount equivalent to union dues must be paid to a charitable organization.

# Part 3

# Acquisition and Termination of Bargaining Rights

# 3

## Certification

THE THRESHOLD QUESTION surrounding the issue of certification is whether certification should be granted to unions on the basis of signed membership cards or a secret ballot vote. Until 1984 membership cards were the standard by which union support was measured and certification awarded in British Columbia. The 1984 amendments to the **Labour Code** required unions to sign up 45% of the workforce as members and then to prevail in a secret ballot vote. Only two other provinces base certification on secret ballot votes (Alberta and Nova Scotia); the rest of Canada relies on signed membership cards. We have concluded that British Columbia should return to a system of certification based on membership cards.

The surface attraction of a secret ballot vote does not stand up to examination. Since the introduction of secret ballot votes in 1984 the rate of employer unfair labour practices in representation campaigns in British Columbia has increased by more than 100%. When certification hinges on a campaign in which the employer participates the lesson of experience is that unfair labour practices designed to thwart the organizing drive will inevitably follow. The statistical profile in British Columbia since introduction of the vote was confirmed by the repeated anecdotes our Committee heard in its tours across the Province. It is also borne out in decisions of the Board and Council. Unions would sign up a clear majority of employees as members and a vote would be ordered. Then key union supporters would be fired or laid-off while threats of closure dominated the campaign and the vote itself was viewed as a vote on whether or not to continue with employment rather than as a vote on redefining the employment relationship. It is not acceptable that an employee's basic right to join a trade union be visited with such consequences and illegal interference. Nor is there any reasonable likelihood of introducing effective deterrents to illegal employer conduct during a representational campaign. A shorter time framework for voting will not deter an employer intent on "getting the message" to his employees. Neither is the imposition of fines and/or the expeditious reinstatement of terminated employees likely to introduce attitudinal or behavioural changes in employers intent on ensuring that their employees do not join unions. The simple reality is that secret ballot votes and their concomitant representational campaigns invite an unacceptable level of unlawful employer interference in the certification process.

There are good reasons for returning to a system of certification on the basis of membership cards. First, there is no compelling evidence that membership cards do not adequately reflect employees wishes. In those cases where improper influence by a union during a certification campaign is established, the Board has a plenary jurisdiction to dismiss the application for certification or to order a secret ballot vote if there is a doubt about the true wishes of the employees. Second, a representational campaign, hotly contested by both employer and trade union, all too often poisons the atmosphere and fosters mistrust between the parties. A campaign fraught with allegations of unfair labour practises results in an atmosphere in which collective bargaining is not likely to succeed. This is to no one's advantage. The decision to join a trade union is, in the final analysis, a decision and right of the employee. And that employee should not be put into the position where he or she is asked to choose

between his or her employer and the right to be represented by a third party in dealings with that employer.

We recommend that a union be entitled to certification when it can demonstrate that 55% of the employees in the bargaining unit have become members. Where the membership support falls between 45% and 55% it should be entitled to a representation vote.

We recommend Regulations, attached to our draft **Code**, that spell out the criteria by which union membership is to be ascertained. For the most part our proposed Regulations reflect the existing jurisprudence. There is one exception. We recommend that, for the purposes of certification, the requirement that employees pay an initiation fee be dropped. We do not believe that the payment of an initiation fee is necessary to establish that employees wish to join a union.

Certain of our proposed Regulations are designed to ensure that certification on the basis of membership cards adequately safeguards the rights of the employees. We recommend that membership cards be required to signify the employee's intent that the trade union represent him or her in collective bargaining. Employees who join a trade union and subsequently reconsider their decision should be entitled to revoke their membership any time prior to the filing of the union's application for certification.

Further, we recommend the development by the Labour Relations Board of "plain language" notices to be posted in all workplaces upon receipt of an application for certification. The intent of these notices would be to fairly advise employees and employers of their respective rights and obligations to one another attendant upon an application for certification. We also recommend establishment of a position of Information Officer at the Labour Relations Board so that employees and employers may obtain from a neutral source any information they require related to the unionization of employees.

## Common Employer and Successorship

We recommend amendments to both Section 37 and Section 53 to bring these provisions into line with the mainstream of Canadian legislation.

Bill 19 amended Section 37 by changing one of the criteria from "common control or direction" to "the same control and direction".

We recommend a return to the former language. By amending this Section we do not wish to be taken as endorsing or disapproving of any particular decision of the Board or Council. Rather, if our recommendation is implemented, we anticipate that the Board will develop its own approach on a case-by-case basis, having regard to the labour relations purpose of the Section.

Although the substantive provision which we recommend is the same as the pre-1987 **Act**, we also recommend that the Board be given express direction to tailor the remedy it selects when a common employer declaration is made. It is our expectation that the Board will exercise its discretion in a flexible manner having in mind the circumstances of the particular case.

# 3

Similarly, we are recommending amendments to Section 53 to bring the section in line with legislation across Canada. We suspect that many of the Bill 19 amendments to Section 53 were introduced to deal with particular decisions of the Labour Relations Board — the more controversial of which focused on the location of the business or the role of particular individuals in the business. In recommending a repeal of the current provisions we are not intending to comment one way or the other on those decisions. If our recommendation is accepted, we would expect the Board to apply its own interpretation of the Section to the cases that come before it in a manner that meets the labour relations purpose of the Section.

We are recommending the deletion of Section 53.1 of the **Act** which deals with bankruptcy. We are not persuaded that the collective bargaining and collective agreement rights should be extinguished where the disposition of a business occurs via a bankruptcy.

We have also proposed a new provision that would continue a collective agreement where a provincial undertaking becomes a successor to a federal undertaking. In such cases, certification rights would still have to be established under the provisions of the provincial **Code**.

## Dependent Contractors

A dependent contractor is defined in the **Act** as :

> *"... a person, whether or not employed by a contract of employment or furnishing his own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor."*

The current legislation permits the certification of dependent contractors only where they can be varied into an existing certification of employees. The effect of this requirement is that in circumstances where there is no existing bargaining unit of employees, persons who are "dependent contractors" of an "employer" have no ability to organize a union and become certified. Further, the legislation deems a dependent contractor to be an employee only *after* the dependent contractor is included in a certification. This has the effect of excluding dependent contractors from protection against unfair labour practices during certification campaigns.

Other jurisdictions in Canada have not imposed this type of restriction on the ability of dependent contractors to unionize. Those jurisdictions which provide for the certification of dependent contractors treat them in the same way as any other employee in terms of certification and the determination of appropriate bargaining units.

Employers in both the forest industry and the road building industry expressed concern at the prospect of a multiplicity of bargaining units of dependent contractors, if "stand-alone" bargaining units of contractors were permitted. It was submitted that the potential of multiple bargaining units of dependent contractors would be a recipe for industrial unrest.

In this area, like almost every other area of the legislation, there are competing interests at play. We are of the opinion that persons who are "dependent contractors" should be entitled to engage in collective bargaining, whether or not there is an existing bargaining unit of employees. On the other hand, we accept the concern that a stand-alone unit for dependent contractors may not be appropriate in circumstances where there exists a certified bargaining unit of employees.

In balancing these competing interests, we recommend a number of amendments which would permit dependent contractors to form a certified bargaining unit, notwithstanding that there may be no certified unit of employees. These amendments include redefining "employee" and "employer" to accommodate the dependent contractor relationship and to ensure that dependent contractors have the same protections as "employees" against unfair labour practices. The proposed amendments would, however, direct the Board to consider whether inclusion of dependent contractors into an existing bargaining unit of employees would be more appropriate for collective bargaining and, if so, require that a variance application be made.

## Raids

A consistent theme in the submissions to our Sub-Committee focused on the confusing legal jurisprudence surrounding the question of when one union may apply to displace another. The criticism is justifiable; the provisions in the legislation are awkward and difficult to decipher. Our recommendations attempt to recognize several competing interests. Employees should have the option of changing unions if they are dissatisfied with their representation. At the same time, incumbent unions should enjoy sufficient security of tenure in their representation rights so that their resources are properly directed to representing members. By the same token, employers are entitled to reasonable insulation from the inevitable disruption to the workplace which accompanies a raid. The democratic rights of the workers can be guaranteed by limiting raids to certain definite periods during the term of the collective agreement. The legislation must indicate clearly when representational campaigns are permissible.

We have attempted to simplify the law with our recommendations. We recommend that raids may occur only during the seventh and eighth month of each year of a collective agreement, and that a 22 month period elapse before a subsequent raid application may be made.

We also recommend that raids should not be permitted without the consent of the Board during a strike or lockout.

# 3

## Sectoral Certification[2]

Between 1973 and 1984 the **Labour Code** provided for a form of multi-employer certification whereby employers within a sector could be organized under one certification. We are recommending a return to a modified form of sectoral bargaining for those small enterprises where employees have been historically underrepresented by trade unions.

The current provision in the **Industrial Relations Act** dealing with multiple employer certification requires the consent of each employer before a multi-employer unit can be certified. Not surprisingly, the provision has never been utilized. The present situation then is one where multiple employer certification is provided for under the statute but virtually impossible to attain.

We consider our recommendations in this area as among the most important and significant we are making. Our recommendations attempt to address the peculiar difficulties that workers in small businesses encounter in seeking union representation.

Statistical information indicates that over 90% of workers in business services, real estate companies, financial institutions, insurance companies and retail trades are unorganized. More than 85% of the workers in restaurants and beverage rooms fall under the same category. These are the fastest growing sectors of the economy and most of the jobs in these areas fall to adult women and part-time youth. And those jobs are often the lowest paying ones in our society.

Existing collective bargaining models, designed for large industrial operations with full-time workforces, have great difficulty operating in these sectors of the economy. Collective bargaining is only viable when there are a sufficient number of employees to justify union organizing and collective bargaining efforts. It is simply impractical and unacceptably expensive for unions to organize and negotiate collective agreements for small groups of workers if their dues cannot begin to cover the costs involved in developing separate collective agreements for each of their work sites. As a result, persons employed as clerical support staff in small business, farmworkers or service station attendants do not have any realistic prospect of ever being represented by a trade union under present labour legislation. Yet, these are the very workers who are most in need of trade union representation. Put simply, for these persons certification and collective bargaining rights are illusory. The options are stark: either maintain a *status quo* in which many workers will seldom achieve collective bargaining rights, or, fashion a model which allows employees in these sectors the option of banding together, for purposes of collective bargaining, with other employees performing the same types of jobs. Only the latter option is consistent with Canada's proposed new **Social Charter** which includes the policy objectives of "protecting the rights of workers to organize and bargain collectively". It is also the option consistent with what we have identified as the purpose of new labour legislation — "to encourage the practice and procedure of collective bargaining ...."

Presently, sectoral bargaining exists in Quebec where a "decree" system imposes uniform wage rates on all employees within a particular sector of the economy. A decree applies whether or not employees at any particular location are unionized. The provisions which were in force in British Columbia for 11 years allowed union to "sweep" employees of a

[2] *Tom Roper disagrees with this recommendation. See Appendix 3.*

particular employer into a bargaining unit as long as the overall majority of employees of all employers supported the union. The amendments we have devised eliminate the possibility of employees at one particular location being swept into a bargaining unit against their wishes; instead, our recommendations allow each group of employees within this sector to decide for themselves whether they wish to be represented by a trade union.

The model we recommend would be available only in sectors which are determined, by the Labour Relations Board, to be historically underrepresented by trade unions and where the average number of employees at work locations within the sector is less than 50. A sector has two characteristics: a defined geographical area (e.g. Marpole, Burnaby, the Lower Mainland or the entire Province) and similar enterprises within the area where employees perform similar tasks (e.g. preparing fast food, child care, picking fruit or pumping gas). For example, a sector could consist of "employees working in fast food outlets in Burnaby".

We recommend that a union which has the requisite support at more than one work location within a sector could apply for certification of the employees **at those locations**. In addition to demonstrating support at each location, the union would have to prevail in a vote amongst all the employees at the work locations where certification was sought. If successful, the union would be granted certification for a bargaining unit within the sector. Collective bargaining would then take place between the union and the various employers whose employees had become certified. A standard collective agreement would be settled and subsequently, if the union could demonstrate sufficient support at additional locations within the sector, it would be entitled to a variance of its bargaining certificate to encompass the new employees. Any collective agreement in place in the sector would apply to the new employees, but the Labour Relations Board would have the option of tailoring the standard agreement to the exigencies of any particular location.

Once a sector has been declared historically underrepresented any trade union can apply for certification within the sector. Accordingly, in our example, three or four different unions might end up representing employees at fast food outlets in Burnaby, each administering its own collective agreement. This feature has several advantages. It ensures that unions who are certified within a sector are not granted a monopoly on representation rights while offering employees within a sector the option of choosing from more than one union.

The model ensures that employees at each location within the bargaining unit will support the union before a certification is varied to include them. This safeguard meets the most common objection to sectoral bargaining and distinguishes the recommendations from the Quebec system and the earlier British Columbia model.

The model we are recommending has parallels which have been in place for many years in other areas of the economy. Construction workers usually work for several employers each year. Each of their employers is one of several on a construction site where the workforce changes from day to day as different stages of construction are completed. Under normal circumstances it would be impossible to organize construction workers

because of the multiplicity of their employers and the changing composition of the workforce. However, collective bargaining has been facilitated for construction workers by the application of a standard collective agreement to all organized worksites and by permitting those workers to avail themselves of union security clauses (basically, the right to invoke non-affiliation clauses which allow them to refuse to work with non-union trades). In a similar way our model would allow special certification processes and the development of standardized collective agreements so that collective bargaining is available in historically underrepresented areas. The point to note is that over the years collective bargaining has worked because it has proven sufficiently flexible to adapt to a variety of new circumstances. Another change is now required.

The system does impose a collective agreement on new employers whose employees elect to join a union during the term of a collective agreement. Too much should not be made of that fact. Under a system of sectoral certification all employers are entitled to participate in the negotiation and renewal of the collective agreement. A collective agreement would be imposed only where an employer became certified during the term of a collective agreement. Even then, our proposal allows the Labour Relations Board a wide discretion to tailor the collective agreement to the peculiar circumstances of any enterprise.

Once certified, an employer would be required to bargain alongside other employers within the sector. That is a common occurrence in many British Columbia industries. Health care, trucking, the woods and pulp and paper — to name only a few — are all industries where a single collective agreement is applied to many different employers. The reality of collective bargaining in British Columbia is that many, if not a majority of, unionized employers operate under collective agreements negotiated on an industry-wide basis. Sectoral bargaining also has advantages for employer organizations and we note that one of the larger employer organizations in the Province (Construction Labour Relations Association) urged us to implement sectoral bargaining in the construction industry.

Opponents of sectoral bargaining assert that it is inconsistent with the trend towards enterprise-based collective bargaining. But that trend is by no means prevalent in all, or even most, sectors of our economy. In those industries where the criteria for sectoral bargaining can be met (historically underrepresented, similar job functions and small work locations), there are usually very standardized terms of employment already in force. One would be hard pressed to discover any major differences in terms and conditions of employment among employees at fast food outlets, medical receptionists, farm workers or domestic workers. Most often, these sectors of the economy are characterized by repetitive tasks, minimum wage levels and part-time employment. In such areas there is every reason to be confident that standardized collective agreements will operate successfully.

In his separate report on sectoral bargaining Tom Roper sets out a passage from a recent book of Paul Weiler's dealing with cartels. Those comments were not made with reference to sectoral bargaining. Cartels are, of course, undesirable. But it cannot be suggested that there is any real likelihood of cartels occurring in sectors of the economy where the organizational levels presently stand at somewhere less than 10% of the work force. We also note that our proposals allow for a multiplicity of unions within a sector — a feature inconsistent with the notion of a cartel.

The observation that only a few of the submissions directed to us urged sectoral bargaining should be balanced by the observation that those organizations represented the vast majority of workers in the Province and, in one case, a large number of employers. More to the point, the recommendations to enact a form of sectoral bargaining recognizes — as do many labour law theorists — that if collective bargaining is to go forward, it must find ways to make itself more available to those presently beyond its reach.

The issue respecting sectoral bargaining is whether certification procedures should be modified so that collective bargaining is a real option for people working in small workplaces. As a matter of principle, we believe certification should be made available to workers in these areas unless doing so would impose unacceptable restrictions on the rights of others. The model we propose — unlike the earlier British Columbia model — rejects the notion of "sweeping in" employees at a particular location against their will. There can be no objection on that score. The employer does lose the right to negotiate its own unique collective agreement but that right is more theoretical than real. It is also a small price to pay for the extension of collective bargaining to those workers who otherwise would have no prospect of ever achieving it.

## Revocation of Bargaining Rights

Our recommended changes in this area are designed to provide a parallel between the procedures for the *acquisition* of bargaining rights and the *revocation* of bargaining rights. For example, our proposal would give the Board discretion to direct another representation vote if less than 55% of eligible employees actually vote.

Further, the Board would have discretion to disregard a representation vote where employees are affected by an unfair labour practice order or where the Board is of the opinion that, by reason of improper interference by the employer, a representation vote is unlikely to disclose the true wishes of employees.

We also recommend the deletion of those provisions in the existing legislation which permit an employer to apply for cancellation of a union's certification and/or collective agreement where no employee has been employed in the bargaining unit for a period of two years. During our tour we heard of cases of employers who discontinued operations in the Province for a two year period, decertified the union, and then returned to the Province to resume business. These provisions had a particularly devastating effect on building trades unions in the construction industry.

In our opinion, there was no justifiable public policy reason for those provisions. The Labour Relations Board has always had the authority, and will continue to have the authority under the sections which we propose to cancel a certification if bargaining rights have been abandoned.

We are also recommending a new provision to authorize the Board to entertain an application to revoke bargaining rights acquired by way of voluntary recognition. The provisions which apply to the cancellation of a certification should also apply to the revocation of voluntarily recognized bargaining rights.

# Part 4

# Collective Bargaining Procedures

# 4

## First Collective Agreement Settlement

THE ACQUISITION OF BARGAINING rights through certification commences a process designed to achieve a collective agreement. Unfortunately, it is often the case that the road to achieving the first collective agreement is a rocky one. Some of the most protracted and bitter labour disputes in this Province have arisen out of first collective agreement negotiations. Indeed, the Sub-Committee heard a number of submissions on many of these first contract disputes. There are a number of reasons why the first round of collective bargaining can lead to protracted disputes.

In some cases, an employer adamantly opposed to unionization engages in an exercise of "surface bargaining", giving the appearance of engaging in collective bargaining with no real intent to ever conclude a collective agreement. In such circumstances, collective bargaining is simply a charade. If a strike or lockout ensues, it very often puts the issue of continued trade union representation in dispute. The reality is that, left to their own devices, the parties are unlikely to achieve a collective agreement.

In other cases it is not the position of the employer that creates the roadblock. It can occur that a recently certified union brings unrealistic demands to the bargaining table. The union may have overestimated the gains which could reasonably be achieved when it organized the employees and now find itself faced with an employer who sees the viability of the business in jeopardy. The union may well have the financial resources to attempt to force its demands through a strike — a strike which has no hope of success without putting the employer out of business.

And in some cases it is simply the inexperience of the parties in collective bargaining which creates unrealistic expectations and roadblocks.

We do not mean to leave the impression that all, or even most, first collective bargaining experiences necessarily fit into one of these scenarios. However, when these problems arise they are a definite impediment towards achieving a collective agreement. They prevent the parties from "moving on" to the next stage of the collective bargaining relationship. The legislative response in most jurisdictions, including British Columbia, has been to provide for binding arbitration, to impose a collective agreement where it is apparent that one side or the other is making the achievement of a collective agreement impossible.

A number of problems can arise when binding arbitration is seen as the first and last response to problems that occur in first contract bargaining. First, it removes from the parties the ability to select their own compromises and fashion a deal of their own making. Second, binding arbitration is a stark and cold mechanism for initiating a collective bargaining relationship. In many ways it can be seen as a pronouncement by the tribunal that collective bargaining has failed.

Nevertheless, there will be occasions when a first collective agreement will be unachievable if the parties are left to their own devices. What we have attempted to do in our recommendations is create a process which encourages the parties to reach a negotiated settlement while at the same time setting out a range of settlement options if direct

negotiations do not result in a settlement of the dispute.

In our view, the most appropriate legislative response should be to encourage, to the extent possible, the use of collective bargaining as the vehicle to achieve a collective agreement. We are recommending a procedure which would allow either party to initiate a process designed to achieve a timely resolution of outstanding issues. The process would involve the appointment of a mediator early in the process at the request of either party. The appointment would preclude a strike or lockout from continuing or commencing without a further direction from the Board. A mediator would then work with the parties to build a relationship and foster collective bargaining. Where that is not possible, the mediator should be able to identify the stumbling block in the dispute, whether it be "surface bargaining" or unrealistic positions or a simple lack of experience.

A mediator should be equipped with the mandate to make a report to the Mediation Division with recommendations as to how the dispute may be settled if mediation fails. In most cases we anticipate the intervention of a mediator will bring about a settlement. Where it does not, the mediator would be required to report to the Associate Chair. Mediation within fixed timelines. The mediator's recommendations could include terms of settlement and/or mediation/arbitration (med/arb), binding arbitration, or the exercise of the right to strike or lockout to resolve the dispute.

In summary, the model which we have recommended is designed to support collective bargaining as the preferred method to reach a collective agreement, and to provide timely assistance to the parties to avoid an irreparable breakdown in the collective bargaining relationship.

## Alteration of Terms and Conditions of Employment Upon Expiry of the Collective Agreement

In 1991 the Supreme Court of Canada issued its decision in **Paccar of Canada Ltd.** (1989) 2 S.C.R. 983 reinstating the decision of the Industrial Relations Council which permitted an employer to unilaterally alter terms and conditions of employment upon the expiry of a collective agreement, so long as the employer met its duty to bargain in good faith.

Although some employers have effected such unilateral changes, the practice is not widespread. This is probably due to the fact that employers recognize that a unilateral alteration of terms during collective bargaining puts the employees to an immediate election as to whether they will strike. An employer knows, therefore, that if the proposed changed terms are not acceptable to the majority of employees, the employees will have the lawful right to refuse to work under those changed terms.

A number of arguments are advanced in support of an employer's right to unilaterally alter terms. First, such a right is consistent with the notion of residual management rights which prevail in the absence of a collective agreement. Second, an employer may strongly hold the view that the union negotiators are standing in the way of changed terms of employment which employees would be prepared to accept.

Those who argue against either party's right to unilaterally impose terms and conditions of employment, point to the scheme of the legislation with its focus on collective bargaining and the principle that a certified union is the exclusive bargaining agent.

A number of Canadian jurisdictions have addressed the question of continuation of collective agreement provisions. For example, in Alberta, Manitoba and New Brunswick, provisions exist which preclude an alteration of terms of employment until a new collective agreement has been concluded, a strike/lockout has occurred, or the union has ceased to be the bargaining agent.

We have recommended a provision in the legislation that would preclude a unilateral alteration of terms of employment during the renegotiation of a collective agreement. Our proposal would preserve an employer's right to suspend, transfer, lay off, discharge or discipline an employee for proper cause.

An employer who believes that a change in the terms of its collective agreement is essential, but is unable to persuade union negotiators, will have two options available: first, exercise a right which we recommend be retained in the legislation to require the employer's final offer be put to a vote by the bargaining unit; secondly, invoke a lockout. If following a lockout the employer offers employment on different terms, the employees would be in a position to either accept those terms or remain on strike.

## Ongoing Consultation

In the introduction to this report, we expressed the view that labour legislation should formally acknowledge the value and importance of ongoing consultation and cooperation between the employer and the trade union to address workplace issues. By its nature, labour legislation encourages an adversarial relationship. That is not necessarily undesirable. Given the fact that the interests of employees and the employer are not always aligned, it is not surprising that our legislation contemplates negotiation with the right to strike or lock-out and third party dispute resolution. An adversarial component to the relationship is, therefore, inevitable. However, we think it important that the legislation strongly signal the desirability of a different relationship to deal with issues such as work reorganization, productivity, technological change and other operational concerns which affect both the competitiveness of the business and the working lives of employees. In finding the balance between these two themes we recognize that it is in each party's interest to build a viable enterprise while at the same time preserving their right to freely negotiate the division of the economic pie created by their joint efforts. Put another way, while labour and management might argue over how the pie is sliced, they should be working together to bake a bigger pie.

We have therefore recommended sections of the Code which provide an unstructured framework within which the parties can develop a cooperative relationship to deal with issues of common concern. These sections would replace existing provisions which deal with technological change.

We have also recommended that facilitators be made available to assist parties in developing a different relationship. Facilitators can assist the parties by providing training in joint problem

solving, management by objectives and similar techniques. It will not be easy for employers or unions to quickly adapt from a confrontational/adversarial approach to one of consultation and cooperation. However, in both the written submissions made to our subcommittee and during our public meetings, both employers and trade union representatives expressed a strong desire for a new relationship. Through our proposed amendments to the Purposes section and this joint consultation provision, and with the assistance of facilitators, we believe that a message can be sent to the labour relations community that cooperation and codetermination in the workplace are desirable and necessary.

# Part 5

# Strikes, Lockouts and Picketing

# 5

## Strikes and Lockout Votes and Notice

WE RECOMMEND CHANGING THE strike/lockout vote notice sections of the legislation in a number of ways.

First, we propose eliminating the requirement that strike and lockout votes be government supervised. In our view, there is no need for government supervision so long as the legislation clearly establishes the rules by which secret ballot votes are to be conducted. We have proposed Regulations which accomplish that objective. The Regulations will require that strike and lockout votes be conducted by secret ballot and that the ballots be retained in case a dispute later arises. The form of the questions on the ballot is also specified.

We have also proposed an amendment to the strike and lockout notice requirements to ensure that 72 hour notice is given to the affected party. The existing legislation, perhaps resulting from an oversight, requires only that 72 hour notice be given to the Board.

The strike/lockout notice provisions which we recommend would permit either party to continue a strike or lockout without the necessity of taking a vote and serving notice, if the other party discontinues an ongoing lawful strike or lockout. By way of example, if an employer invoked a lockout and then lifted it after a day or so, the union would be permitted to continue a withdrawal of services (i.e. engage in a strike) without having to comply with the voting and notice requirements. This would allow a union to reject an employer's unilateral alteration of terms and conditions of employment following a lockout, by continuing a strike. However, if a lockout was discontinued and the union did not invoke a strike within 72 hours (i.e. if the union returned to work within that period) then it would be required to comply with the strike vote and notice provisions before engaging in strike activity. The same would apply in the case of an employer who sought to invoke a lockout after a strike had been discontinued, where the lockout was not invoked within 72 hours of the discontinuance of the strike.

We also recommend that renewed strike notice be given in essential service disputes where a union or employer does not exercise its right to strike or lockout upon the expiry of the 72 hour notice period. In essential services an employer will begin to implement contingency plans when strike notice is given. These contingency plans will often disrupt services ordinarily provided to the public. The employer may be forced to continue the exigency plan even when strike activity does not occur upon the expiry of the 72 hour notice, out of concern for the fact that a strike could be implemented at any time thereafter. Having in mind the interests of the public, it is our opinion that further notice should be given before a strike or lockout *actually* occurs.

We have also recommended the deletion of the reference to "construction work" in Section 83 of the Act. In doing so, we do not intend to alter the legal scope and legality of non-

affiliation clauses as they relate to the construction industry. The Labour Relations Board and Council have developed jurisprudence to delineate non-affiliation rights. Our proposed amendment would not affect that jurisprudence.

## Picketing

On the issue of picketing we have set out in the Appendices to our report three different options for your consideration. The three options reflect our agreement on substantial aspects of appropriate legislation in this area. We agree that the site of picketing should, as a general rule, be where an employee works. We agree therefore that picketing at secondary locations of employers should be enjoined in most cases. We also agree that a neutral employer who shares a common site with a struck or locked out operation should, as a matter of policy, be insulated from the effects of picketing.

Our disagreements centre on two issues: the manner in which the Board ought to exercise its discretion to insulate neutral employers at common sites and whether or not two divisions of an employer at the same location should be treated as separate employers.

## Continuation of Benefits

It is often the practice in this Province that, during the course of a lawful strike or lockout, the employer will agree with the union to maintain health and welfare benefits for the duration of a strike so long as the union pays both the employee and employer costs of maintaining the benefits. In the absence of such agreements, an employee may well find it difficult, if not impossible, to replace these coverages during a lawful strike or lockout. This exposes the employee and his or her family to substantial risk in the event of illness, disability or death.

In the absence of an agreement, the question of the benefit continuation can be a significant obstacle to a resolution of the collective bargaining dispute. We believe that the legislation should ensure that employees and their families are not left without benefit coverage if the union is prepared to undertake the full costs of maintaining the benefits. Accordingly, we have recommended an amendment which would provide for the continuation of health and welfare benefits (excluding pensions) for the duration of a lawful dispute, so long as the union absorbs the total cost. With this amendment, an issue which can, but need not, stand in the way of resolving the collective bargaining dispute, can be removed.

## Replacement Worker Prohibition

Many submissions were made to us concerning the use of replacement workers during a strike or lockout. Employee groups urged us to recommend "anti-scab" legislation similar to that in force in Quebec and proposed for Ontario. Employers strenuously rejected the concept.

# 5

We are not in agreement on this issue: nor have we been able to narrow our differences. John Baigent supports a prohibition on the use of replacement workers. Tom Roper disagrees with such a prohibition. Vince Ready believes that the Minister should be entitled to intervene when replacement workers are used. Appendix 5 of our report sets out the views and proposals of each member of the Sub-Committee.

# Part 6

# Essential Services

# 6

WE ARE RECOMMENDING A number of important amendments to the essential services provisions of the **Code**. As these provisions have to do with the regulation of a strike or lockout in essential services, as opposed to mediation and disputes resolution, we recommend that they form a separate Part of the **Code**.

We recommend that essential services be more narrowly defined as those necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia.

Consistent with what we have already said about intervention in collective bargaining, the decision to invoke the essential services designation provisions of the **Code** should rest with the Minister of Labour, following receipt of a report from the Chair of the Board. The focus of the new provisions is on mediation as the preferred mechanism to settle designations. However, we believe that it is necessary that the Board review the outcome of the mediation process and ultimately make the designation decision.

Where the Minister directs the Board to make essential services designations, prior to the commencement of a strike or lockout, then the designation process should be complete before a strike or lockout commences. We are satisfied that the nature of essential service industries requires such a provision to protect the public interest and our recommendations ensure that will occur. Having said that, we have also recommended specific timeframes within which the designation process must be completed so as not to unduly interfere with the right to strike or lockout. Consistent with this approach we recommend the removal of the provision in the current legislation providing for the imposition of a "cooling off" period.

The Minister may decide that an essential services designation should be made during the course of a strike or lockout. Under our recommended provision the designation of essential services by the Board would not preclude a continuation of the strike or lockout when that occurs.

Designation orders are often subject to variation to meet the day-by-day exigencies of the labour dispute. The automatic filing of Board designation orders in the Courts could unnecessarily restrict the flexibility required. Accordingly, we believe that the Board should retain a discretion as to whether, or when, its designation orders should be filed.

# Part 7

# Mediation and Disputes Resolution

# 7

THERE WAS GENERAL CONSENSUS within the labour relations community that mediation should remain under the auspices of the Labour Relations Board. However, there was also consensus that the existing Part 8.1 (Disputes Resolution) provided the Commissioner of the Industrial Relations Council with excessive powers to intervene in collective bargaining. We agree that mediation should remain with the Board, and not form a separate branch of the Ministry of Labour. We also agree that the power to intervene in collective bargaining should be minimized. Accordingly, we have recommended a new "Mediation and Disputes Resolution" Part of the Code which outlines the various roles and responsibilities in this important area.

This Part would retain the traditional form of mediation and fact finding but eliminate forms of intervention such as the Public Interest Inquiry Board and provisions relating to interest arbitration. We are of the opinion that employers and trade unions, including those in the public sector, should be free to agree to interest arbitration to resolve a collective bargaining dispute. By agreeing to interest arbitration, the parties would also fashion their own terms of reference for the arbitrator. In other words, interest arbitration should be entirely consensual with the parties free to utilize it if they wish and, if they do so, to establish the terms of reference.

To the extent that further intervention may be required, we recommend that the decision rest with the Minister of Labour, the elected custodian of the public interest. Accordingly, we have recommended the introduction of a new provision for special mediation whereby the Minister may appoint a special mediator at any time during a collective bargaining dispute to assist the parties in reaching an agreement.

We also recommend retaining the provision for last offer votes. We are satisfied that this provision has resulted in the settlement of a number of collective agreements and that it is therefore appropriate to allow an employer to require a vote on its final offer before a strike or lockout commences. This also provides for a cleansing of the air in those disputes where one side doubts the other's resolve. Thereafter, the Minister should be in a position to order that a vote be taken if he or she deems it appropriate to do so.

# Part 8

# Arbitration Procedures

# 8

## Expedited Arbitration

IN OUR HEARINGS THROUGHOUT THE Province we heard persistent complaints from employers and unions concerning the delays and costs inherent in the present arbitration system. Our own experience and investigations suggest that those complaints are valid. A survey of grievance arbitration in 1990 and 1991 by the Ministry of Labour, indicates that the average arbitration in British Columbia took 2.3 days of hearing time and that, on average, 12 weeks elapsed from the first day of hearing to the date of the award. In most cases a considerably longer period of time will have occurred between the completion of the steps in the grievance procedure and the first day of hearing. Not surprisingly, the survey indicates 3 person boards are likely to take more days of hearing to complete and to involve a longer timeframe for deliberations than is the case with an arbitration conducted by a single arbitrator. Typically, arbitrations conducted by a single arbitrator involved a single hearing date versus two days for a three person panel.

A quick and inexpensive system of arbitration is an essential component of an harmonious workplace. When workplace disputes linger they become accentuated and undermine good working relationships. Illegal work stoppages are far less likely to occur when employees are confident of a prompt resolution of their grievances. Labour legislation must ensure that grievances are adjudicated promptly and inexpensively.

We recommend a statutory form of expedited arbitration administered by a new Arbitration Bureau and available at the option of either union or employer for a resolution of any grievance. The system we are recommending is based on models which have proven successful in Ontario and Manitoba. The essential features of the system include a separate Bureau whose function is to maintain a roster of arbitrators from which single arbitrators are appointed to hear grievance disputes. The system allows either an employer or a union to apply to the Bureau for expedited arbitration upon completion of the steps in the grievance procedure and for the hearing to commence within 28 days of the Arbitrator's appointment. Access to the system would be available regardless of the terms of the collective agreement, although the parties would be free to continue using the arbitration processes under the collective agreement — but only if both parties agree to do so. Prior to the commencement of the hearing either party could apply for the services of a Settlement Officer who will be assigned by the Arbitration Bureau from the existing pool of Industrial Relation Officers working throughout the Province. If the matter is not settled by the Settlement Officer the hearing will proceed as scheduled before a single arbitrator. A decision must be handed down by the Arbitrator within 21 days of the hearing.

It is our recommendation that the Arbitration Bureau operate as a stand-alone service reporting directly to the Ministry of Labour. Because the Labour Relations Board has responsibility for reviewing arbitration decisions, the Arbitration Bureau should be distinct from it. We also believe that the function of arbitration is sufficiently important and distinct from statute-oriented disputes to warrant the creation of a separate bureau to oversee its successful utilization.

In addition to its role in appointing arbitrators for expedited arbitration hearings the Bureau will also appoint arbitrators for non-expedited hearings where the parties are unable to agree upon selection of an arbitrator.

Crucial to the success of any arbitration system is a pool of competent and accessible arbitrators. It is also important that the system be responsive to the needs of the parties actually using the system. There is an understandable perception that to a large extent the present system has been hijacked by the legal profession. In order to provide the parties themselves with control over the system we are recommending the appointment by the Minister of a Labour Management Advisory Committee consisting of two members nominated by trade unions, two members appointed by the employer community, and an additional two members to be drawn from the Arbitrators Association of British Columbia. The function of the Committee would be to assist the Director of the Bureau in the selection and training of a pool of arbitrators. The Committee would screen new applicants for inclusion on the roster of arbitrators and devise suitable training programs for new recruits.

We have decided against recommending legislated fee schedules for arbitrators appointed by the Arbitration Bureau notwithstanding that one of the most consistent points made to us involved the excessive cost of arbitration today. There are other ways the cost dilemma can be addressed short of legislating a fee structure. First, speeding up the process will itself go a long way toward reducing fees. Second, the infusion of a large number of new arbitrators into the system will operate to reduce costs. And finally, the introduction of different tiers of arbitration will inevitably allow the parties to select different models of arbitration for different types of cases. The less expensive expedited system will undoubtedly prove attractive for many grievances while the parties may continue to utilize conventional arbitration boards for difficult interpretation issues.

We recommend that persons appointed by the Arbitration Bureau be required to advise it of their hourly rates and, as a term of their appointments, advise the Bureau of any changes in those rates. We expect that the Director will monitor the costs incurred by the parties under the system and, to an appropriate extent, ensure that the costs of arbitration to the parties are acceptable and predictable. While arbitrators would be free to establish their own rates the Director should be encouraged to consider rates in making actual appointments. An arbitrator whose experience may dictate a higher rate might be appropriately appointed for a major dispute while a more junior and less expensive arbitrator would be more appropriately assigned to disputes of a minor nature. In order for the system to operate effectively, we believe that the roster of arbitrators should contain the names of at least 50 arbitrators, and should strive for gender equality.

We also recommend an alternative form of expedited hearing, involving a mediator/arbitrator who would be assigned by the Bureau upon the joint request of the parties. Under this system the mediative and arbitral functions are combined in one person.

# Related Arbitration Matters

We agree with the Hoogendorn principle which permits an employee whose rights might be affected by an arbitration, to participate in the arbitration proceedings. However, we are also mindful of the delay and cost implications involved when extra participants are added to a hearing. Our recommendations address the cost issue and involve an amendment which would allow an arbitration board to direct that a portion of the costs of the Chair be borne by an individual who participates in a hearing.

We also recommend changes that would expressly empower arbitrators to encourage the settlement of disputes while providing that they retain jurisdiction until there is a final solution of all matters in dispute. We also recommend a provision which would clarify their jurisdiction to determine and make orders relating to prehearing matters and the procedure governing hearings.

# Part 9

# Labour Relations Board

# 9

AS WILL BE APPARENT FROM THE structure of the legislation which we propose, we are recommending that the substantive provisions be followed by provisions which deal with the tribunal and its administration. In recommending this reordering, we do not minimize in any way the importance of the tribunal. We believe that the Board, in administering the legislation, plays a vital role through its decisions in maintaining the balance which the proposed legislation seeks to achieve.

## Evidence

We are recommending a change to the existing legislation which would require that all reports to the Board from persons appointed to investigate an application or to investigate an attempt to settle a dispute, be disclosed to the parties. This would include reports made by Industrial Relations Officers or Special Investigating Officers. The public disclosure of such reports is consistent with principles of procedural fairness and the requirement that the parties be made aware of all of the information, relevant to a particular application, which is placed before the Board for consideration.

An exception to the requirement for disclosure to the parties, would be information relating to union membership. Such information would be for the exclusive use of the Board. The Board would retain the discretion to require the disclosure of information as to whether or not a person is a member of a trade union, where it is necessary to do so in order to properly adjudicate a dispute.

## Offices of the Board

We recommend that the Chair of the Board be authorized to designate Ministry of Labour offices throughout the Province, as places where documents may be filed with the Board. The designation of local offices will not only convenience the labour relations community but also serve to expedite the processing of applications.

## Publication

The existing legislation requires that all decisions of the Board be available in writing for publication. We are proposing an amendment to that provision which would also require that the Board render its decisions within a reasonable period of time.

This amendment is a legislative recognition of the importance of the timely resolution of labour relations disputes to the overall industrial stability in the Province.

## Interim Orders[3]

The majority of the Sub-Committee have made a recommendation to amend the existing provision in the legislation pertaining to the issuance of interim orders. The reasons supporting this recommendation are set out in the appendix dealing with picketing. The majority's recommendation is designed to facilitate the expeditious resolution of disputes relating to unlawful strikes/lockouts and picketing.

[3] *John Baigent disagrees with this recommendation. See Appendix 4.*

## Reconsideration of Labour Relations Board Decisions

Under the present labour legislation there is no restriction on the right of a party to appeal decisions of the tribunal to another Panel of the Council. Nor is there any limit in the legislation on "an appeal of an appeal". Since decisions of the Council include review of arbitration decisions, a simple dispute may often involve three decisions: the arbitration board decision, the appeal of that decision, then a review of the review of the appeal decision. These delays are inimical to the expeditious manner in which labour disputes should be resolved. We recommend that parties no longer be allowed, as matter of right, to appeal decisions of the Labour Relations Board. Rather, we recommend that the decisions of the Labour Relations Board be reviewed by another Panel of the Labour Relations Board only with leave from the Board. We recommend that leave should be granted only when a party can demonstrate that a decision of the Board is inconsistent with principles set out in the **Labour Code** or that evidence, not previously available, has become available.

## Declaratory Opinion

The existing provision of the legislation permits the Board to give a declaratory opinion on a matter arising under the **Code** only "... if it considers it necessary and proper to do so." We are of the view that such a precondition to a declaratory opinion is too restrictive. There are situations in labour relations where parties should not be forced to act in order to determine their rights or obligations. Accordingly, we believe that the Board should be given a broad discretion to issue a declaratory opinion where it is appropriate to do so.

## Registrar

We have recommended an amendment to the legislation which would formally recognize the designation of one of the Vice-Chairs as Registrar of the Board. Our purpose in making this recommendation is to acknowledge the importance of the Registrar's position in the functioning of the Board.

We have not made any recommendation in the legislation as to particular functions or duties which the Registrar should exercise. However, it is our recommendation that, to the extent that it is administratively possible, the Registrar should not be assigned to panels rendering substantive decisions on cases before the Board. Rather, the Registrar should adjudicate procedural matters on applications and complaints. Our recommendation in this

regard is not to minimize, at all, the position of Registrar — in fact, our purpose is just the opposite. We believe that, if the Registrar is to function effectively, parties must be free to deal openly and candidly with the Registrar on matters which they are bringing to the Board. The Registrar should be in a position to discuss an application or complaint with a party when it reaches the Board without the party feeling compromised by the fact that the Registrar may ultimately be assigned to a panel to decide the matter. Simply stated, it is our belief that the effective functioning of the Registrar's office requires that, where possible, the Registrar not be involved in the adjudication of the merits of applications which come before the panel. We recognize that circumstances may arise where the Registrar should, or must, be involved in such adjudication and we would therefore leave our recommendations with the Board for its consideration.

# Part 10

# Miscellaneous

# 10

SEVERAL SUBMISSIONS ADDRESSED two items outside of our mandate.

Teachers and school trustees made representations to us concerning the most appropriate structure for collective bargaining in the Province. We also heard representations from teachers concerning certain provisions of the **School Act** which allow a Board of School Trustees to designate personnel as administrative officers resulting in their exclusion from the bargaining unit. We offer no comment on these submissions and consider that both issues should be addressed to the Commission of Inquiry into the Public Service and Public Sector (The Korbin Commission).

Many others who appeared before us recommended that school curricula in British Columbia deal with the history and role of collective bargaining in the Province. This is a sound proposal. Many young British Columbians will one day have the option of joining a union; others will represent employers engaged in collective bargaining with unions. All too often the interaction commences with the principal players not understanding the legitimate role of the other in the workplace and the collective bargaining process. We believe sound industrial relations are important to all British Columbians and that our educational system should develop curricula which will ensure that future decisions in this area are well informed.

## Ombudsman

Since 1973 and the enactment of the **Labour Code** an unproclaimed part of our labour legislation has provided for the appointment of a Labour Ombudsman. Under the terms of the unproclaimed legislation the Labour Ombudsman has the power to investigate and make recommendations concerning decisions or policies made by any of the host of players involved in labour relations in the Province.

Those recommendations which we received to recommend proclamation of the Labour Ombudsman provisions were coupled with proposals that the Labour Ombudsman be provided with an overriding jurisdiction to deal with complaints of "unfair representation" by trade unions or to review internal union discipline. We see no advantage in adding yet another layer of recommendations or decision making in this area. In our view it is more appropriate to streamline existing provisions in the **Act**. Our recommendations do this. Accordingly, we recommend that the unproclaimed sections dealing with the Labour Ombudsman be repealed.

## Construction Industry

Our Sub-Committee received considerable input during the consultation process relating to the construction industry and the particular issues which arise in that industry. One of the mandates of the Committee of Special Advisors

> *"is to make recommendations as to whether there should be separate legislative provisions governing industrial relations practices in the construction industry."*

A number of the issues which were identified to us, arising in the construction industry, are addressed in the legislative changes which we have proposed. The Committee has decided to defer consideration of the specific mandate, set out above, until the government has dealt with the Code. It is anticipated that the Committee will deal with its specific mandate relating to the construction industry, during the latter part of the Fall of this year.

## Fishing Industry

The United Fishermen and Allied Workers Unions ("UFAWU") presented a submission to our committee requesting legislative amendments which would recognize the right of the union to become certified for fishers under provincial labour legislation. The Fish Processors Association of British Columbia submitted that the bargaining relationships in the industry are complex but, despite the absence of statutory recognition, have proven to be workable.

There has been a long history of collective bargaining (over fish prices and/or wages) between the Union and fish processors in this Province. While the UFAWU has sought and achieved provincial certification for shoreworkers and tendermen employed by processing companies it is not certified for bargaining units of fishers.

There are several reasons why fishers have not been certified in this Province. Until recently, there was some constitutional uncertainty concerning the jurisdiction over fishers. However, a recent decision of the Ontario Court of Appeal, from which leave to appeal to the Supreme Court of Canada was denied, appears to have resolved that issue. It is now clear that the Province can legislate concerning collective bargaining for fishers. Newfoundland and Nova Scotia have enacted specific legislation to regulate collective bargaining by fishers.

The UFAWU does not consider that the existing labour legislation is suitable for certification of fishers in some respects. Although the relationship between a fisher and the captain of a boat on which he works is analogous to the traditional relationship between and employee and an employer, it has been argued that fishers cannot be considered "employees" because they are paid a share of the catch rather than a wage, thus making them joint venturers. It is also suggested that the definition of employer in the legislation does not capture the relationship between a processing company and the fisher from whom it purchases fish. As well, the status of the fisher, who sells his catch to any number of buyers, may or may not fit within the definition of a dependent contractor. Aside from these issues, there is the question of appropriate bargaining relationships between fishers and the persons they bargain with.

# Appendices

# Appendix 1

## Proposed Draft Labour Relations Code

# DRAFT LABOUR RELATIONS CODE

## Contents


### PART 1

INTRODUCTORY PROVISIONS

Section

1. Definitions
2. Purposes of the Code
3. Continuing review of the Code

### PART 2

RIGHTS, DUTIES AND UNFAIR LABOUR PRACTICES

4. Rights of employers and employees
5. Prohibition against dismissals, etc. for exercising employee rights
6. Unfair labour practices
7. Limitation on activities of trade unions
8. Right to communicate
9. Coercion and intimidation prohibited
10. Internal union affairs
11. Requirement to bargain in good faith
12. Duty of fair representation
13. Procedure for fair representation complaint
14. Inquiry into unfair labour practice
15. Collective agreement may provide for union membership
16. Assignment of fees and dues
17. Religious objections

### PART 3

ACQUISITION AND TERMINATION OF BARGAINING RIGHTS

Division 1 – Acquisition of Bargaining Rights

18. Acquisition of bargaining rights
19. Raids
20. Joint application
21. Multiple employer certification
22. Craft unions
23. Determination of appropriate unit
24. Certification
25. Representation vote ordered by board
26. Outcome of representation vote
27. Request for representation vote
28. Effect of certification

29. Dependent contractors
30. Unit partly supervisory
31. Repeated applications for certification
32. Prohibited employee associations
33. No change during certification

Division 2 – Revocation of Bargaining Rights

34. Revocation of bargaining rights
35. Revocation of voluntarily recognized bargaining rights

Division 3 – Successor Rights and Obligations

36. Successor rights and obligations
37. Federal-provincial successorship
38. Merger or amalgamation
39. Several businesses treated as one employer

Division 4 – Voting

40. Voting requirements
41. Additional voting requirements

Division 5 – Councils of Trade Unions

42. Certification of councils of trade unions
43. Dissolution of councils of trade unions

Division 6 – Employers' Organizations

44. Accreditation of employers' organization
45. Employers' organization membership and fees

PART 4

COLLECTIVE BARGAINING PROCEDURES

Division 1 – General

46. Notice to bargain collectively
47. Notice before expiry of agreement
48. Collective bargaining
49. Parties bound by collective agreement
50. Terms of collective agreement to be carried out
51. Agreement for less than one year
52. Copies of collective agreements to be filed
53. Extraprovincial companies

Division 2 – Joint Consultation and Adjustment Plans

54. Joint consultation
55. Adjustment plan

Division 3 – First Collective Agreement

56. First collective agreement

PART 5

STRIKES, LOCKOUTS AND PICKETING

57. Definition
58. Strikes and lockouts prohibited during term of collective agreement
59. Honouring of agreement
60. Strikes and lockouts prohibited before bargaining and vote
61. Pre-strike voting and notice
62. Pre-lockout vote and notice
63. Continuation of benefits
64. Rights preserved
65. Information
66. Picketing
67. Actions
68. Picketing restricted
69. Other acts not actionable
70. Declaratory opinion
71. Refusal of order

PART 6

ESSENTIAL SERVICES

72. Essential services
73. Return to work

PART 7

MEDIATION AND DISPUTES RESOLUTION

Division 1 – Mediation and Fact Finding

74. Mediation officer and services
75. Notice of strike or lockout
76. Special mediator
77. Fact finding
78. Last offer votes

Division 2 – Commissions and Councils

79. Industrial inquiry commission
80. Industry advisory councils

PART 8

ARBITRATION PROCEDURES

Division 1 – Interpretation and Purpose

81. Definitions
82. Purpose of Part

Division 2 – Collective Agreement Arbitration Bureau

83. Collective Agreement Arbitration Bureau

Division 3 – Collective Agreement Provisions

84. Dismissal or arbitration provision
85. Unworkable provision
86. Failure to appoint arbitrators
87. Settlement officer
88. Action by Labour Relations Board
89. Authority of arbitration
90. Fees and costs
91. Delay by arbitration board
92. Powers of arbitration board
93. Summons to testify
94. Decision of arbitration board
95. Effect of decision
96. Filing decision
97. Act not to apply
98. Reference to Labour Relations Board
99. Appeal jurisdiction of Labour Relations Board
100. Appeal jurisdiction of Court of Appeal
101. Decision final
102. Enforcement
103. Share of cost of grievance recommendations

Division 4 – Expedited Arbitration

104. Expedited arbitration
105. Consensual mediation-arbitration

Division 5 – Special Officer

106. Special officer
107. Effect of order
108. Interim order
109. Powers
110. Evidence
111. Frequency of appointment
112. Form of order
113. Notice of appointment to be sent to board
114. Other divisions to apply

PART 9

LABOUR RELATIONS BOARD

115. Labour Relations Board
116. Divisions and officers of the Labour Relations Board
117. Panels
118. Quorum
119. Proceedings
120. Question of law

121. Delegation
122. Employees and expenses
123. Powers of board
124. Evidence
125. Summons and discovery of documents
126. Practice and procedure
127. Offices of the board
128. Publication of decisions
129. Oath of office
130. Vacancies
131. Compensation and conditions of service
132. General guidelines
133. Hearing of complaint
134. Conditions and undertakings
135. Filing order in Supreme Court
136. Jurisdiction of board
137. Jurisdiction of court
138. Finality of decisions and orders
139. Jurisdiction of board to decide certain questions
140. General powers of board
141. Reconsideration of decisions
142. Variation and continuation of certification or accreditation
143. Declaratory opinion

PART 10

MISCELLANEOUS

144. Powers of minister
145. Power to enter and inspect
146. Information confidential
147. Payment of members of tribunals
148. Execution of documents
149. Board may require returns
150. Trusteeship over local unions
151. Financial statements
152. Mailed notice presumed received
153. Service of documents
154. Legal entity
155. Evidentiary effect of documents
156. Technicalities not to invalidate proceedings
157. Reports
158. Penalty
159. Regulations

PART 11

TRANSITIONAL PROVISIONS AND REPEAL

160. Transitional
161. Transitional - membership cards
162. Transitional - regulations
163. Repeal
164. Commencement

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

## PART 1

### INTRODUCTORY PROVISIONS

**Definitions**

**1.** (1) In this Code

"associate chair" means the associate chair of that division of the board appropriate to the context;

"bargaining agent" means

(a) a trade union certified by the board as an agent to bargain collectively for an appropriate bargaining unit, or

(b) a person, or an employers' organization accredited by the board, authorized by an employer to bargain collectively on his or her behalf;

"board" means the Labour Relations Board and where applicable includes the chair, an associate chair, a division of the board and a panel established under section 117;

"chair" means the chair of the Labour Relations Board appointed under this Code;

"collective agreement" means a written agreement between an employer, or an employers' organization authorized by the employer, and a trade union, providing for rates of pay, hours of work or other conditions of employment, which may include compensation to a dependent contractor for furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing;

"collective bargaining" means negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision, or to the regulation of relations between an employer and employees;

"council of trade unions" includes an allied council, a trades council, a joint board or another association of trade unions;

"day" means a calendar day;

"dependent contractor" means a person, whether or not employed by a contract of employment or furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for

compensation or reward on such terms and conditions that he or she is in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

"dispute" means a difference or apprehended difference between an employer or group of employers, and one or more of his or her or their employees or a trade union, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done;

"employee" means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,

(a) performs the functions of a manager or superintendent, or

(b) is employed in a confidential capacity in matters relating to labour relations or personnel;

"employer" means a person who employs one or more employees or uses the services of one or more dependent contractors and includes an employers' organization;

"employers' organization" means an organization of employers in British Columbia that has as one of its purposes the regulation in British Columbia of relations between employers and employees through collective bargaining;

"lockout" includes closing a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his or her employees, done to compel his or her employees or to aid another employer to compel his or her employees to agree to conditions of employment;

"party" means a person bound by a collective agreement, or involved in a dispute;

"person" includes an employee, an employer, an employers' organization, a trade union and council of trade unions, but does not include a person in respect of whom collective bargaining is regulated by the *Canada Labour Code;*

"picket" or "picketing" means attending at or near a person's place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to

(a) enter that place of business, operations or employment,

(b) deal in or handle that person's products, or

(c) do business with that person,

and a similar act at such a place that has an equivalent purpose;

"professional strike breaker" means a person who is not involved in a dispute and whose primary object, in the board's opinion, is

(a) to prevent, interfere with or break up a lawful strike, or

(b) to assist an employer in a lockout;

"special officer" means a special officer appointed under section 106;

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services, but does not include

(a) a cessation of work permitted under section 64 (3), or

(b) a cessation, refusal, omission or act of an employee that occurs as the direct result of and for no other reason than picketing that is permitted by or under this Code,

and "to strike" has a similar meaning;

"trade union" means a local or Provincial organization or association of employees, or a local or Provincial branch of a national or international organization or association of employees in British Columbia, that has as one of its purposes the regulation in British Columbia of relations between employers and employees through collective bargaining, and includes an association or council of trade unions, but not an organization or association of employees that is dominated or influenced by an employer;

"unit" means an employee or a group of employees, and the expression "appropriate for collective bargaining" or "appropriate bargaining unit", with reference to a unit, means a unit determined by the board to be appropriate for collective bargaining, whether it is an employer unit, craft unit, technical unit, plant unit or another unit, and whether or not the employees in it are employed by one or more employer.

(2) A person does not cease to be an employee within the meaning of this Code by reason only of ceasing to work as a result of

(a) a strike that is not contrary to this Code,

(b) a dismissal that is contrary to this Code, or

(c) a lockout.

**Purposes of the Code**

**2.** (1) The following are the purposes of this Code:

(a) to encourage the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees;

(b) to encourage cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity;

(c) to minimize the effects of labour disputes on persons who are not involved in the dispute;

(d) to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;

(e) to ensure that the public interest is protected during labour disputes;

(f) to encourage the use of mediation as a dispute resolution mechanism.

(2) The board shall exercise the powers and perform the duties conferred or imposed on it under this Code having regard to the purposes set out in subsection (1).

**Continuing review of the Code**

**3.** (1) The minister may appoint a committee of special advisors to undertake a continuing review of this Code and labour management relations and, without limitation, to

(a) provide the minister with an annual evaluation of the manner in which the legislation is functioning and to identify problems that may have arisen under its provisions,

(b) make recommendations concerning the need for amendments to the legislation, and

(c) make recommendations on any specific matter referred to the committee by the minister.

(2) The minister may make regulations considered necessary or advisable respecting the receipt and dissemination of submissions and recommendations under subsection (1).

## PART 2

### RIGHTS, DUTIES AND UNFAIR LABOUR PRACTICES

**Rights of employers and employees**

**4.** (1) Every employee is free to be a member of a trade union and to participate in its lawful activities.

(2) Every employer is free to be a member of an employers' organization and to participate in its lawful activities.

**Prohibition against dismissals, etc. for exercising employee rights**

**5.** (1) No person shall

(a) refuse to employ or refuse to continue to employ a person,

(b) threaten dismissal of or otherwise threaten a person,

(c) discriminate against or threaten to discriminate against a person with respect to employment or a term or condition of employment or membership in a trade union, or

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Code or because the person has made or is about to make a disclosure that may be required of the person in a proceeding under this Code or because the person has made an application, filed a complaint or otherwise exercised a right conferred by or under this Code or because the person has participated or is about to participate in a proceeding under this Code.

(2) If no collective agreement respecting a unit is in force and a complaint is filed with the board alleging that an employee in that unit has been discharged, suspended, transferred or laid off from employment or otherwise disciplined in contravention of this Code, the board shall forthwith inquire into the matter and, if the complaint is not settled or withdrawn, the board shall

(a) commence a hearing on the complaint within 3 days of its filing,

(b) promptly proceed with the hearing without interruption, except for any necessary adjournments, and

(c) render a decision on the complaint within 2 days of the completion of the hearing.

**Unfair labour practices**

**6.** (1) An employer or a person acting on behalf of an employer shall not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

(2) Despite this section, an employer may permit an employee or representative of a trade union to confer with the employer during working hours or to attend to the trade union's business during working hours, without deducting time so occupied in computing the time worked for the employer and without deducting wages for that time.

(3) An employer or a person acting on behalf of an employer shall not

(a) discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or to continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person

(i) is or proposes to become or seeks to induce another to become a member or officer of a trade union, or

(ii) participates in the promotion, formation or administration of a trade union,

(b) discharge, suspend, transfer, lay off or otherwise discipline an employee except for proper cause when a trade union is in the process of conducting a certification campaign for employees of that employer,

(c) impose in a contract of employment a condition that seeks to restrain an employee from exercising his or her rights under this Code,

(d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to

compel or to induce an employee to refrain from becoming or continuing to be, a member or officer or representative of a trade union,

(e) use, or authorize or permit the use of, a professional strike breaker or an organization of professional strike breakers, or

(f) refuse to agree with a trade union, certified under this Code as the bargaining agent for his or her employees who have been engaged in collective bargaining to conclude their first collective agreement, that all employees in the unit, whether or not members of the trade union, but excluding those exempted under section 17, will pay union dues from time to time to the trade union.

(4) Despite subsection (3), except as expressly provided, this Code shall not be interpreted to limit or otherwise affect the right of the employer to

(a) discharge, suspend, transfer, lay off or otherwise discipline an employee for proper cause, or

(b) make a change in the operation of the employer's business reasonably necessary for the proper conduct of that business.

**Limitation on activities of trade unions**

**7.** (1) Except with the employer's consent, a trade union or person acting on its behalf shall not attempt, at the employer's place of employment during working hours, to persuade an employee of the employer to join or not join a trade union.

(2) If employees reside on their employer's property or on property to which the employer or another person has the right to control access or entry, the employer or other person shall on the board's direction permit a representative authorized in writing by a trade union to enter the property to attempt to persuade the employees to join a trade union and, if the trade union acquires bargaining rights, to thereafter enter the property to conduct business of the trade union.

(3) If directed by the board and on request by the trade union representative, the employer shall provide the representative with food and lodging at the current price, and of a similar kind and quality as that provided to the employees.

**Right to communicate**

**8.** Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business.

**Coercion and intimidation prohibited**

**9.** A person shall not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.

**Internal union affairs**

**10.** (1) Every person has a right to the application of the principles of natural justice in respect of all disputes relating to

(a) matters in the constitution of the trade union,

(b) the person's membership in a trade union, or

(c) discipline by a trade union.

(2) No trade union shall expel, suspend or impose a penalty on a member or refuse membership in the trade union to a person, or impose any penalty or make any special levy on a person as a condition of admission to membership in the trade union or council of trade unions

(a) if in doing so the trade union acts in a discriminatory manner, or

(b) because that person has refused or failed to participate in activity prohibited by this Code.

(3) If a trade union charges, levies or prescribes different initiation fees, dues or assessments in respect of a person according to whether the person applies or has applied for membership in the trade union before or after an application for certification by the trade union to represent the person as bargaining agent, the fees, dues or assessment shall be deemed to be discriminatory for the purpose of subsection (2) (a).

**Requirement to bargain in good faith**

**11.** (1) A trade union or employer shall not fail or refuse to bargain collectively in good faith in British Columbia and to make every reasonable effort to conclude a collective agreement.

(2) If a trade union and the employer have concluded a collective agreement outside British Columbia, it is invalid in British Columbia until a majority of the employees in British Columbia covered by the agreement ratify it.

**Duty of fair representation**

**12.** (1) A trade union or council of trade unions shall not act in a manner that is arbitrary, discriminatory or in bad faith

(a) in representing any of the employees in an appropriate bargaining unit, or

(b) in the referral of persons to employment

whether or not the employees or persons are members of the trade union or a constituent union of the council of trade unions.

(2) It is not a violation of subsection (1) for a trade union to enter into an agreement under which

(a) an employer is permitted to hire by name certain trade union members,

(b) a hiring preference is provided to trade union members resident in a particular geographic area, or

(c) an employer is permitted to hire by name persons to be engaged to perform supervisory duties.

(3) An employers' organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the employers in the group appropriate for collective bargaining.

**Procedure for fair representation complaint**

**13.** (1) If a written complaint is made to the board that a trade union, council of trade unions or employers' organization has contravened section 12, the following procedure must be followed:

(a) a panel of the board shall determine whether or not it considers that the complaint discloses a prima facie case that the contravention has occurred;

(b) if the panel considers that the complaint discloses a prima facie case, it shall

(i) serve a notice of the complaint on the trade union, council of trade unions or employers' organization

against which the complaint is made and invite a reply to the complaint from the trade union, council of trade unions or employers organization, and

(ii) dismiss the complaint or refer it to the board for a hearing.

(2) If the board is satisfied that the trade union, council of trade unions or employers' organization contravened section 12, the board may make an order or direction referred to in section 14 (4) (a), (b) or (d).

**Inquiry into unfair labour practice**

**14.** (1) If a written complaint is made to the board that any person is committing an act prohibited by section 5, 6, 7, 9, 10, 11 or 12, the board shall serve a notice of the complaint on the person against whom it is made and on any other person affected by it.

(2) The board may appoint an officer to inquire into the complaint and attempt to settle the matter complained of, and the officer shall report the results of his or her inquiry and endeavours to the board.

(3) If an appointment is not made under subsection (2), or the officer is unable to settle the matter, the board may inquire into the complaint.

(4) If, on inquiry, the board is satisfied that any person is doing, or has done, an act prohibited by section 5, 6, 7, 9, 10, 11 or 12, it may

(a) make an order directing the person to cease doing the act,

(b) in the same or a subsequent order direct any person to rectify the act,

(c) in the case of an employer, include a direction to reinstate and pay an employee a sum equal to wages lost due to his or her discharge, suspension, transfer, layoff or other disciplinary action contrary to section 6 (3) (a) or (b),

(d) in the case of a trade union, include a direction to reinstate a person to membership in the trade union and pay to that person

(i) a sum equal to wages lost due to his or her expulsion or suspension contrary to section 10, and

(ii) the amount of any penalty, levy, fee, dues or assessment imposed on him or her contrary to section 10,

(e) in the same or a subsequent order direct the employer not to increase or decrease wages, or alter a term or condition of employment of the employees affected by the order for a period not exceeding 30 days without written permission of the board, and the board may extend this order for a further period not exceeding 30 days, and

(f) if the employees affected by the order are seeking trade union representation and the board is of the opinion that the union would likely have obtained the requisite support had it not been for the act prohibited by section 5, 6, 7, 9, 10, 11 or 12, certify the trade union.

(5) The board may impose conditions it considers necessary or advisable on a trade union that is certified under subsection (4) (f), and if the conditions are not substantially fulfilled to the board's satisfaction within 12 months from the date of the certification, or in a lesser period ordered by the board, the certification shall be deemed to be cancelled.

(6) If in the board's opinion a complaint under subsection (1) is without merit, it may reject the complaint at any time.

(7) On an inquiry by the board into a complaint under section 6 (3) (a) or (b), the burden of proof that the employer did not contravene paragraph (a) or (b) lies on the employer.

**Collective agreement may provide for union membership**

**15.** (1) Nothing in this Code shall be construed as precluding the parties to a collective agreement from inserting in it, or carrying out, a provision

(a) requiring membership in a specified trade union as a condition of employment, or

(b) granting preference in employment to members of a specified trade union.

(2) Despite subsection (1), a trade union or person acting on its behalf shall not require an employer to terminate the employment of an employee due to his or her expulsion or suspension from that trade union on the ground that he or she is or was a member of another trade union.

**Assignment of fees and dues**

**16.** (1) An employer shall honour an employee's written assignment of wages to a trade union certified as the bargaining agent for his or her employees under this Code, unless the assignment is declared null and void by the board, or is revoked by the assignor.

(2) The assignment shall be substantially in the following form:

To [name of employer].

Until this authority is revoked by me in writing, I hereby authorize you to deduct from my wages and to pay to [name of the trade union] fees and dues in the amounts following:

(1) Initiation fees in the amount $_____;
(2) Dues of $_____ per _____;
(3) Dues of _____ % of hourly, weekly or monthly wages.

(3) Except where an assignor of wages revokes the assignment by written notice to the employer, or the board declares an assignment to be null and void, the employer shall remit at least once each month to the trade union certified under this Code and named in the assignment the fees and dues deducted, with a written statement containing the names of the employees for whom deductions were made and the amount of each deduction.

(4) If an assignment is revoked, the employer shall give a copy of the revocation to the assignee.

(5) Despite subsections (1), (2) and (3), the employer has no financial responsibility for the fees or dues of an employee, unless the employer owes the employee sufficient unpaid wages to pay the fees and dues assigned.

**Religious objections**

**17.** (1) If the board is satisfied that an employee, because of his or her religious conviction or belief,

(a) objects to joining trade unions generally, or

(b) objects to the paying of dues or other assessments to trade unions generally

the board may order that the provisions of a collective agreement of the type referred to in section 15 do not apply to the employee and that the employee is not required to join a

trade union, to be or continue to be a member of a trade union, or to pay any dues, fees or assessments to the trade union, if amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization registered as a charitable organization in Canada under Part I of the *Income Tax Act* (Canada) that may be designated by the board.

(2) Despite any other provision of this Code, a person exempted under subsection (1) is not entitled to participate in a vote conducted by a trade union or in a vote held for the purposes of this Act.

*[Sections 4.1 and 9.1 of the *Industrial Relations Act* have been deleted. Tom Roper disagrees with this recommendation. See Appendix 2.]

# PART 3

## ACQUISITION AND TERMINATION OF BARGAINING RIGHTS

### Division 1 – Acquisition of Bargaining Rights

**Acquisition of bargaining rights**

**18.** (1) If a collective agreement is not in force and a trade union is not certified as bargaining agent for a unit appropriate for collective bargaining, a trade union claiming to have as members in good standing not less than 45% of the employees in that unit may at any time, subject to the regulations, apply to the board to be certified for the unit.

(2) If a collective agreement is not in force and a trade union is certified as bargaining agent for a unit appropriate for collective bargaining, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may, subject to the regulations, apply to the board to be certified for the unit if either

(a) 6 months have elapsed since the date of certification of a trade union for the unit, or

(b) the board has consented to an application before the expiry of the 6 months.

(3) Unless the board consents, a trade union is not permitted to make an application under subsection (2) during a strike or lockout.

(4) Despite this section and section 19

(a) a trade union that is a party to a collective agreement, but is not certified for the employees covered by it, may apply to be certified at any time, and

(b) a council of trade unions comprised of trade unions that are parties to collective agreements may apply to be certified at any time in place of those trade unions.

**Raids**

**19.** (1) If a collective agreement is in force, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may apply to the board to be certified for the unit during the seventh and eighth months in each year of the collective agreement or any renewal or continuation of it.

(2) Despite subsection (1), an application for certification may not be made within 22 months of a previous application under that subsection if the previous application resulted in a decision by the board on the merits of the application.

(3) Unless the board consents, a trade union is not permitted to make an application under this section during a strike or lockout.

**Joint application**

**20.** Two or more trade unions claiming to have together as members in good standing a majority of employees in a unit appropriate for collective bargaining may join in an application under this Part, and the provisions of this Code relating to an application by one trade union, and all matters or things arising from it, apply to the application and those trade unions as if one trade union were applying.

**Multiple employer certification***

**21.** (1) In this section

"equivalent number of part time employees" means a number of employees whose combined hours of work each week equal the hours of work of 50 full time employees;

*[Tom Roper disagrees with this recommendation. See Appendix 3 ]

"full time employees" means employees who work an average of 40 hours each week;

"historically underrepresented by trade unions" means with respect to a sector a percentage of employees represented by trade unions within the sector that, in the opinion of the board, is significantly lower than the percentage of employees represented by trade unions in all industries in British Columbia;

"sector" means a geographical area within or encompassing all of British Columbia and employees within that area who perform similar work tasks for employers engaged in similar enterprises.

(2) Applications under this section may only be made for sectors where the average number of full time employees, or the equivalent number of part time employees, at all work locations of employers within the sector, is less than 50.

(3) A trade union claiming to have as members in good standing not less than 45% of the employees at each of more than one work location within a sector historically underrepresented by trade unions may apply to the board

(a) for a declaration that the sector has been historically underrepresented by trade unions, and

(b) to be certified for a unit within the sector consisting of employees at work locations within the sector where the trade union claims to have as members in good standing not less than 45% of the employees.

(4) If, in an application under this section, the board determines that a sector is historically underrepresented by trade unions, it may make a declaration to that effect, and if the board is satisfied that not less than 45% of the employees at each work location within the unit are members in good standing of the union and that the unit is appropriate for collective bargaining, the board shall direct that a representation vote be taken of all the employees in the unit, and sections 25 and 26 apply.

(5) Before making a declaration under subsection (4), the board shall hold a hearing and publish notice of the hearing in a newspaper circulating in the area encompassed by the sector and give written notice to the employers referred to in the application, and the board shall give full opportunity to the

parties, employers within the sector and, in its discretion, interested trade unions, to present evidence and make submissions.

(6) If a trade union is certified under this section and one or more collective agreements are already in force between the union and one or more of the employers named in the application, the board may, in order to facilitate the establishment of one collective agreement for the unit,

(a) determine that no collective agreement is in effect or binding on all or any of the employees and permit the union and the employer to commence collective bargaining,

(b) extend the provisions of one or more collective agreements that are in effect to any or all of the employees and employers,

(c) settle the terms and conditions of a new collective agreement based in whole or in part on one or more of the collective agreements in effect and binding on all or any of the employees, or

(d) make other orders or determinations that may be necessary or advisable to carry out the purposes of this section.

(7) A declaration under subsection (4) of historical underrepresentation by trade unions in a sector applies to any subsequent application for certification by another trade union within that sector under this section.

(8) After a sector has been declared historically underrepresented by trade unions, a trade union that has been certified under this section and that claims to have as members in good standing not less than 45% of the employees at another work location within the sector, may apply at any time to vary its certification to include those employees at that work location.

(9) Subject to subsection (12), if a trade union applies to vary its certification under subsection (8) and,

(a) if the board is satisfied that not less than 55% of the employees at the new work location are members in good standing of the trade union, it shall vary the certification of the trade union to include the new employees, or

(b) if the board is satisfied that not less than 45% and not more than 55% of the employees at the new work location are members in good standing of the trade union, it shall direct

that a representation vote be taken of the employees at the new work location and, if the majority of votes favours representation by the trade union, the board shall vary the certification of the union to include the new employees.

(10) Subject to subsection (12), when the certification of a trade union is varied under subsection (9) any collective agreement in force between the union and employers within the sector applies and is binding on the union and the employer at the new work location.

(11) In an application under subsection (8) the bargaining unit including the employees sought to be included in it by the variance shall be deemed appropriate for collective bargaining.

(12) When the certification of a trade union is varied under subsection (9) the board may, on application by either the union or the employer

(a) give directions the board considers necessary or advisable as to the interpretation and application of a collective agreement affecting the employees added to the certification, and

(b) where the employer demonstrates to the satisfaction of the board that one or more terms of the collective agreement between the union and employers in the sector are unworkable at a work location, modify or restrict the operation or effect of a provision of the collective agreement other than its term.

**Craft unions**

**22.** (1) If a group of employees belongs to a craft or group exercising technical or professional skills that distinguish it from the employees as a whole, and they are members of one trade union pertaining to the craft or skills, the trade union may, subject to sections 18, 19, 20, 21, 24, 25, 26 and 27, apply to the board to be certified as the bargaining agent for the group if it is otherwise an appropriate bargaining unit.

(2) A trade union claiming to have as members in good standing a majority of the employees in a unit for which a craft or professional trade union is the bargaining agent under this section may apply to the board to have the unit included in another unit, and sections 18, 19, 20, 21, 24, 25, 26 and 27 apply.

(3) If an application is not made under subsection (2), the employees in the unit for which a craft or professional trade union is the bargaining agent under this section shall be excluded from another unit for the purpose of collective bargaining and shall not be taken into account as members of another unit for purposes of this Code.

**Determination of appropriate unit**

**23.** (1) When a trade union applies for certification as the bargaining agent for a unit, the board shall determine if the unit is appropriate for collective bargaining and may, before certification, include additional employees in or exclude employees from the unit.

(2) The board shall make or cause to be made the examination of records and other inquiries including the holding of hearings it considers necessary to determine the merits of an application for certification, and shall specify the nature of the evidence the applicant must furnish in support of the application and the manner of application.

(3) Membership in good standing in a trade union must be determined on the basis of membership requirements prescribed in the regulations.

**Certification**

**24.** (1) If the board is satisfied that on the date it receives an application for certification not less than 55% of the employees in the unit are members in good standing of the trade union and that the unit is appropriate for collective bargaining, the board shall certify the trade union as bargaining agent for the employees in the unit.

(2) In deciding whether a person is a member in good standing of a trade union, the board may decide the question without regard to the constitution and bylaws of the trade union.

**Representation vote ordered by board**

**25.** (1) The board, to determine whether the employees in an appropriate bargaining unit wish to have a particular trade union represent them as their bargaining agent, may order that a representation vote be taken, in accordance with the regulations, among the employees of the unit.

(2) If, on an application under section 18, 19, 21 or 22 the board is satisfied not less than 45% and not more than 55% of the employees in a unit are members in good standing of the trade union, it shall direct that a representation vote be taken.

(3) The board shall order that a representation vote be conducted within 10 days of the date of the application under section 18, 19, 21 or 22 or, if the vote is conducted by mail within a longer period the board orders.

(4) The board may direct that another representation vote be taken if

(a) a representation vote is taken, and

(b) less than 55% of eligible employees cast ballots.

**Outcome of representation vote**

**26.** (1) When a representation vote is taken, a majority shall be determined as the majority of the employees in the unit who cast ballots.

(2) If after a representation vote is conducted the board is satisfied that the majority of votes favour representation by the trade union, the board shall certify the trade union as the bargaining agent for the unit.

**Request for representation vote**

**27.** (1) On an application for certification, a trade union may request that a representation vote be taken before the board's determination of the appropriate bargaining unit.

(2) On the request being made, the board may determine the group of persons who may vote; and if it appears to the board on examining the records of the trade union and of the employer that not less than 45% of the employees in the unit were members of the trade union when the application was made, the board may direct that a representation vote be taken among the employees in the unit.

(3) The board may direct that the ballot box containing the ballots from a representation vote under this section be sealed and the ballots not be counted until the parties have been given full opportunity to present evidence and make submissions.

(4) After a representation vote under this section, the board shall determine the unit of employees appropriate for collective bargaining, and where it is satisfied that not less than 45% of the employees in the unit were members of the trade union when the application was made, the representation vote has the same effect as a representation vote under sections 25 and 26.

**Effect of certification**

**28.** (1) If a trade union is certified as the bargaining agent for an appropriate bargaining unit,

(a) it has exclusive authority to bargain collectively for the unit and to bind it by a collective agreement until the certification is cancelled,

(b) if another trade union has been certified as the bargaining agent for the unit, the certification of that other trade union is cancelled for the unit, and

(c) if a collective agreement binding on the unit is in force at the date of certification, the agreement remains in force.

(2) Despite subsection (1) (c) and except if the trade union party to the collective agreement obtains the certification, the rights and obligations that were conferred or imposed by the collective agreement on the trade union party to the collective agreement cease in so far as that trade union is concerned, and are conferred or imposed on the trade union certified as the bargaining agent.

**Dependent contractors**

**29.** (1) If an application for certification is made for a unit consisting of, or including, dependent contractors, and the application meets the requirements of section 24, the board shall

(a) if there is no other certified unit of employees of the same employer, determine whether the unit applied for is appropriate for collective bargaining and, if so, certify that unit, or

(b) if there is a certified unit of employees of the same employer, determine whether inclusion of the dependent contractors in the existing unit would be more appropriate for collective bargaining and, if so, require that an application be made to vary the certification.

(2) If the board has determined under subsection (1) (b) that a variance of the existing bargaining unit would be more appropriate for collective bargaining and an application for variance is made, the board shall

(a) determine what rights, privileges and duties have been acquired or are retained, and for this purpose the board may make inquiries or direct that a representation vote be taken as it considers necessary or advisable,

(b) ensure that reasonable procedures have been developed to integrate dependent contractors and employees into a single bargaining unit,

(c) modify or restrict the operation or effect of a collective agreement in order to determine the seniority rights under it of employees or dependent contractors, and

(d) give directions that the board considers necessary or advisable, as to the interpretation and application of a collective agreement affecting the employees and dependent contractors in a unit determined under this section to be appropriate for collective bargaining.

**Unit partly supervisory**

**30.** If a trade union applies for certification as the bargaining agent for a unit consisting of

(a) employees who supervise other employees, and

(b) any of the other employees,

the board may certify the trade union for the unit, for a unit consisting only of employees who supervise or for a unit composed of some or all of the other employees.

**Repeated applications for certification**

**31.** If the trade union is not certified as the bargaining agent under section 24, or a cancellation of certification is refused under section 34 (4) (b), the board may designate the length of time, not less than 90 days, that must elapse before a new application by the same applicant may be considered.

**Prohibited employee associations**

**32.** An organization or association of employees

(a) the formation, administration, management or policy of which is, in the board's opinion, dominated or influenced by an employer or a person acting on his or her behalf, or

(b) that discriminates against a person contrary to the *Human Rights Act*,

shall not be certified for the employees, and an agreement entered into between that organization or association of employees and the employer shall be deemed not to be a collective agreement.

**No change during certification**

**33.** (1) If an application for certification is pending, a trade union or person affected by the application shall not declare or engage in a strike, an employer shall not declare a lockout, and an employer shall not increase or decrease rates of pay, or alter a term or condition of employment of the employees affected by the application, without the board's written permission.

(2) This section shall not be construed as affecting the right of an employer to suspend, transfer, lay off, discharge or discipline an employee for proper cause.

### Division 2 – Revocation of bargaining rights

**Revocation of bargaining rights**

**34.** (1) If, at any time after a trade union has been certified for a unit, the board is satisfied, after the investigation it considers necessary or advisable, that the trade union has ceased to be a trade union, or that the employer has ceased to be the employer of the employees in the unit, it may cancel the certification.

(2) If a trade union is certified as the bargaining agent for a unit and not less than 45% of the employees in the unit sign an application for cancellation of the certification, the board shall order that a representation vote be conducted within 10 days of the date of the application or, if the vote is to be conducted by mail, within a longer period the board orders.

(3) An application referred to in subsection (2) may not be made

(a) during the 10 months immediately following the certification of the trade union as the bargaining agent for the unit,

(b) during the 10 months immediately following a refusal under subsection (6) to cancel the certification of that trade union, or

(c) during a period designated by the board under section 31 following a refusal under subsection (4) (b) of this section to cancel the certification of that trade union.

(4) After a representation vote ordered under subsection (2) is held the board shall,

(a) if the majority of the votes included in the count are against having the trade union represent the unit as the bargaining agent, cancel the certification of the trade union as the bargaining agent for that unit, or

(b) if the majority of votes included in the count favour having the trade union represent the unit as bargaining agent, refuse the application.

(5) The board may direct that another representation vote be taken if

(a) a representation vote was taken under subsection (2), and

(b) less than 55% of eligible employees cast ballots.

(6) If an application is made under subsection (2), the board may, despite subsections (2) and (4), cancel or refuse to cancel the certification of a trade union as bargaining agent for a unit without a representation vote being held, or without regard to the result of a representation vote, in any case where

(a) any employees in the unit are affected by an order under section 14, or

(b) the board considers that by reason of improper interference by the employer a representation vote is unlikely to disclose the true wishes of the employees.

(7) Despite subsection (10), if the certification of a trade union as one bargaining agent for a unit is cancelled under subsection (6), that trade union shall not, during the 10 months immediately following the cancellation, apply for certification as the bargaining agent for employees in the unit.

(8) Subject to subsection (9), where the certification of a trade union as the bargaining agent is cancelled under any provision of this Code, a collective agreement between the trade union

and the employer of the employees in the unit for which the certification is cancelled is void with respect to that unit.

(9) Nothing in subsection (8) affects the operation of section 28 (1) (c) and (2).

(10) If the certification of a trade union as bargaining agent for a unit is cancelled under any provision of this Code, no other trade union may apply for certification as bargaining agent for the employees within that unit until a period of 10 months or a shorter period specified by the board has elapsed.

(11) On receipt of an application for cancellation of certification the board may cancel the certification of a bargaining agent for a bargaining unit if it is satisfied that the bargaining agent has abandoned its bargaining rights in respect of the employees in the bargaining unit.

**Revocation of voluntarily recognized bargaining rights**

**35.** Section 34 applies to the revocation of bargaining rights where a trade union is a party to a collective agreement but is not certified for the employees covered by the collective agreement.

### Division 3 – Successor rights and obligations

**Successor rights and obligations**

**36.** (1) If a business or a part of it is sold, leased, transferred or otherwise disposed of, the purchaser, lessee or transferee is bound by all proceedings under this Code before the date of the disposition, and the proceedings shall continue as if no change had occurred; and if a collective agreement is in force, it continues to bind the purchaser, lessee or transferee to the same extent as if it had been signed by the purchaser, lessee or transferee, as the case may be.

(2) If a question arises under this section, the board, on application by any person, shall determine what rights, privileges and duties have been acquired or are retained, and for this purpose the board may make inquiries or direct that representation votes be taken as it considers necessary or advisable.

(3) The board, having made an inquiry or directed a vote under this section, may

(a) determine whether the employees constitute one or more units appropriate for collective bargaining,

(b) determine which trade union shall be the bargaining agent for the employees in each unit,

(c) amend, to the extent it considers necessary or advisable, a certificate issued to a trade union or the description of a unit contained in a collective agreement,

(d) modify or restrict the operation or effect of a provision of a collective agreement in order to define the seniority rights under it of employees affected by the sale, lease, transfer or other disposition, and

(e) give directions the board considers necessary or advisable as to the interpretation and application of a collective agreement affecting the employees in a unit determined under this section to be appropriate for collective bargaining.

**Federal-provincial successorship**

**37.** If collective bargaining relating to a business is governed by the laws of Canada and that business or part of it is sold, leased, transferred or otherwise disposed of and becomes subject to the laws of British Columbia, section 36 applies and the purchaser, lessee or transferee is bound by any collective agreement in force at the time of the disposition.

**Merger or amalgamation**

**38.** (1) If a trade union claims that by reason of a merger, amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was certified as the bargaining agent for a unit, the board may, in a proceeding before the board or on application by the trade union concerned,

(a) declare that the successor has, or has not, acquired its predecessor's rights, privileges and duties under this Code, or

(b) dismiss the application.

(2) Before issuing a declaration under subsection (1), the board may make inquiries, require the production of the evidence and hold the votes it considers necessary or advisable.

(3) If the board makes an affirmative declaration under subsection (1), for the purposes of this Code the successor acquires the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise.

**Several businesses treated as one employer**

**39.** If in the board's opinion associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Code and grant such relief, by way of declaration or otherwise, as the board considers appropriate.

## Division 4 - Voting

**Voting requirements**

**40.** (1) All voting directed by the board or by the chair under this Code and other votes held by a trade union or employers' organization of their respective members on a question of whether to strike or lock out, or whether to accept or ratify a proposed collective agreement, shall be by ballot cast in such a manner that the person expressing a choice cannot be identified with the choice expressed.

(2) The results of a vote referred to in subsection (1), including the number of ballots cast and the number of votes for, against or spoiled, shall be made available to both

(a) the members, and

(b) the trade union and employer affected.

(3) A vote referred to in subsection (1) must be conducted in accordance with the regulations.

(4) If the board in its discretion directs that they may vote, the following persons are eligible to vote in a representation vote:

(a) persons who at the time an application for certification was received by the board were not employees within the proposed unit but are employees in the unit at the time of the vote;

(b) persons who at the time an application for decertification was received by the board were employees in the unit, but are not employees in the unit at the time of the vote.

**Additional voting requirements**

**41.** (1) Subject to section 17 (2), all employees in a bargaining unit, whether or not they are members of the trade union or of any constituent union of a council of trade unions, may participate in votes held by a trade union of its members on a question of whether to strike or whether to accept or ratify a proposed collective agreement.

(2) For the purpose of subsection (1), an employee working during a lawful strike or lockout as a replacement for an employee who is on strike or locked out is not an employee in a bargaining unit.

(3) If a trade union coordinates collective bargaining on behalf of more than one bargaining unit, the results of any vote conducted by the trade union of a particular bargaining unit shall not be counted until all bargaining units engaged in the bargaining have voted.

(4) If a vote is conducted by mail, the vote shall, for the purposes of this Code, be deemed to have been held on the day that ballot papers are left with a post office as defined by the *Canada Post Corporation Act* (Canada) for transmission to the persons who are to vote or, if the ballot papers are left for that purpose with the post office on different days, on the last of those days.

## Division 5 – Councils of Trade Unions

**Certification of councils of trade unions**

**42.** (1) To secure and maintain industrial peace and promote conditions favourable to settlement of disputes, the minister may, on application by one or more trade unions or on his or her own motion, and after the investigation considered necessary or advisable, direct the board to consider, despite section 18, 19, 21 or 22, whether in a particular case a council of trade unions would be an appropriate bargaining agent for a unit.

(2) If a direction is made under subsection (1), the board shall determine whether

(a) the proposed bargaining unit is appropriate for collective bargaining, and

(b) the proposed council of trade unions is representative of the employees in that unit

and shall make any other examination of records, inquiry or findings including the holding of hearings it considers necessary to determine the matter.

(3) After a determination under subsection (2) and if the board considers it necessary or advisable the board may certify a council of trade unions as the bargaining agent, or vary a certification by substituting for the trade union or trade unions named in it a council of trade unions as bargaining agent for that unit.

(4) The provisions of this Code relating to an application for certification of, and the certification of a trade union apply to an application for certification of and certification of a council of trade unions.

(5) The board may make orders and issue directions as it considers necessary or advisable respecting the formation of councils of trade unions and the fair representation of the trade unions comprising the council of trade unions.

(6) If the board certifies a council of trade unions under this section, it may

(a) determine that no collective agreement is in effect or binding on all or any of the employees in the unit,

(b) determine whether a provision of a collective agreement is binding on all or any of the employees in the unit,

(c) determine that a provision in a collective agreement that is in effect and binding on all or any of the employees should continue to be in effect and binding on those employees for a term the board determines,

(d) extend the provisions of one or more collective agreements that are in effect to all or any of the employees,

(e) settle the terms and conditions of a new collective agreement based in whole or in part on one or more of the collective agreements in effect and binding on all or any of the employees, and

(f) make other orders or determinations that may be necessary or advisable to carry out the purposes of this section.

**Dissolution of councils of trade unions**

**43.** (1) A constituent union of a council of trade unions shall not withdraw from the council of trade unions unless it obtains the consent of the board and complies with subsection (2) or (3).

(2) If a council of trade unions is a party to or is bound by a collective agreement, no resolution, bylaw or other action by the constituent trade unions of that council of trade unions to dissolve the council of trade unions, or by a constituent trade union of that council of trade unions to withdraw from the council of trade unions, as the case may be, has effect

(a) unless a copy of the resolution, bylaw or other action is delivered to the employer and, in the case of a withdrawal, to the other constituent members and to the council of trade unions, at least 90 days before the collective agreement ceases to operate, and

(b) until the collective agreement ceases to operate.

(3) If a council of trade unions is not a party to or bound by a collective agreement, no resolution, bylaw or other action by the constituent trade unions of that council of trade unions to dissolve the council of trade unions, or by a constituent trade union of that council of trade unions to withdraw from the council of trade unions, has effect until the 90th day after the day a copy of the resolution, bylaw or other action is delivered to the employer and, in the case of a withdrawal, to the other constituent members and to the council of trade unions.

## Division 6 – Employers' Organizations

**Accreditation of employers' organization**

**44.** (1) Despite this Code or a collective agreement, an employers' organization may, subject to the regulations, apply to the board to be accredited as bargaining agent for the employers named in the application.

(2) The board shall make or cause to be made the examination of records or other inquiries, including the holding of hearings it considers necessary to determine the merits of the application, and shall specify the manner of application and the nature of the evidence that the applicant shall furnish in support of the application.

(3) The board may, before accreditation, add the names of additional employers to or delete the names of employers from those named in the application.

(4) If after the inquiry the board considers adequate it is satisfied the employers named in the application, or in the application as amended under subsection (3),

(a) constitute a group appropriate for collective bargaining,

(b) are members of the employers' organization applying or have been added to the application under subsection (3), and

(c) have agreed to accreditation of the applicant as bargaining agent,

the board may accredit the employers' organization as bargaining agent for the employers named in the accreditation.

(5) If an employers' organization is accredited under this section, it has exclusive authority for the time the employer is named in the accreditation to bargain collectively for the employer and to bind the employer by collective agreement.

(6) If an employer named in an accreditation applies to the board to amend the accreditation by deleting the employer's name from it, and

(a) the employer has been included in the accreditation for 2 years, and

(b) the employer makes the application not less than 9 months before the expiry date of all collective agreements entered into by the employers' organization on the employer's behalf,

the board shall grant the application.

**Employers' organization membership and fees**

**45.** (1) An employers' organization shall not

(a) refuse membership in the employers' organization to an employer, or

(b) terminate an employer's membership in the employers' organization

except for a cause that is in the board's opinion fair and reasonable.

(2) An employers' organization shall not charge or levy initiation fees, dues or assessments that are in the board's opinion unreasonable or discriminatory.

## PART 4

## COLLECTIVE BARGAINING PROCEDURES

### Division 1 – General

**Notice to bargain collectively**

**46.** (1) When the board certifies a trade union as bargaining agent for employees in a unit and a collective agreement is not in force,

(a) the trade union may by written notice require the employer to commence collective bargaining, or the employer may by written notice require the trade union to commence collective bargaining, and

(b) the employer shall not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until

(i) 4 months after the board certifies the trade union as bargaining agent for the unit, or

(ii) a collective agreement is executed,

whichever occurs first.

(2) If notice to commence collective bargaining has been given and the term of a collective agreement that was in force between the parties has expired, neither the employer nor the trade union shall, except with the consent of the other, alter any term or condition of employment, until

(a) a strike or lockout has commenced,

(b) a new collective agreement has been negotiated, or

(c) the right of the trade union to represent the employees in the bargaining unit has been terminated,

whichever occurs first.

(3) Despite subsection (1), the board, after notice to the trade union, may authorize an employer to increase or decrease the rate of pay of an employee in the unit, or alter a term or condition of employment, and may specify conditions to be observed by an employer so authorized.

(4) This section shall not be construed as affecting the right of an employer to suspend, transfer, lay off, discharge or otherwise discipline an employee for proper cause.

**Notice before expiry of agreement**

**47.** (1) Either party to a collective agreement, whether entered into before or after the coming into force of this Code, may at any time within 4 months immediately preceding the expiry of the agreement, by written notice require the other party to commence collective bargaining.

(2) A copy of the notice given under section 46 and the notice with the endorsement required under this section shall be sent by registered mail to the associate chair of the Mediation Division within 3 days after notice is given under subsection (1) of this section.

(3) The endorsement must state where, when and to whom the original notice was given.

(4) If a notice is not given under subsection (1) by either party 90 days or more before the expiry of the agreement, both parties shall be deemed to have given notice under this section 90 days before the expiry.

**Collective bargaining**

**48.** If notice to commence collective bargaining has been given

(a) under section 46, the trade union and the employer, or

(b) under section 47, the parties to the collective agreement

shall, within 10 days after the date of notice, commence to bargain collectively in good faith, and make every reasonable effort to conclude a collective agreement or a renewal or revision of it.

**Parties bound by collective agreement**

**49.** A collective agreement is binding on

(a) a trade union that has entered into it or on whose behalf a council of trade unions has entered into it, and every employee of an employer who has entered into it, who is included in or affected by the agreement, and

(b) an employer who has entered into it and on whose behalf an employers' organization authorized by that employer has entered into it.

**Terms of collective agreement to be carried out**

**50.** (1) A person bound by a collective agreement, whether entered into before or after the coming into force of this Code, shall do everything the person is required to do and shall refrain from doing anything the person is required to refrain from doing by the provisions of the collective agreement, and failure to do so is a contravention of this Code.

(2) If an agreement is reached as the result of collective bargaining, both parties shall execute it.

(3) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of or under this Code, and if there is any conflict between a provision of a collective agreement and a requirement of or under this Code, the requirement of or under this Code prevails.

**Agreement for less than one year**

**51.** (1) Despite anything contained in it, a collective agreement, whether entered into before or after the coming into force of this Code, shall, if for a term of less than one year, be deemed to be for a term of one year from the date it came or comes into operation, and shall not, except with the minister's consent be terminated by the parties within a period of one year from that date.

(2) Subject to subsection (4), if a collective agreement is for a term of more than one year, either party may at any time after the agreement has been in operation for 8 months apply to the minister for leave to notify the other party that the agreement will be terminated on its next anniversary date.

(3) If the minister consents to the application under subsection (2) and the notice to terminate is served on the other party at least 3 months before the date on which the agreement is to be terminated, the agreement is terminated on that date.

(4) At the time of making a collective agreement for more than a year, the parties may, in the agreement, specifically exclude the operation of subsections (2) and (3), and in that event subsections (2) and (3) do not apply to the agreement.

**Copies of collective agreements to be filed**

**52.** Each of the parties to a collective agreement shall, within 30 days after its execution, file a copy of it with the minister and with the board.

**Extraprovincial companies**

**53.** (1) An extraprovincial company for which a trade union has been certified as bargaining agent for a unit of employees of that company shall, within 5 days of the certification,

(a) appoint a person resident in British Columbia with authority to bargain collectively,

(b) conclude a collective agreement with the trade union, and

(c) sign the agreement on behalf of the company.

(2) A collective agreement signed by a person appointed under subsection (1) is binding on the company.

(3) If the minister believes that no appointment has been made as required by subsection (1), the minister may make the appointment and notify the company and the trade union, and that appointment is as binding on the company as if the person were appointed by the company.

**Division 2 – Joint Consultation and Adjustment Plans**

**Joint consultation**

**54.** (1) A collective agreement must contain a provision requiring a consultation committee to be established if a party makes a written request for one after the notice to commence collective bargaining is given or after the parties begin bargaining.

(2) The consultation committee provision must provide that the parties consult regularly during the term of the agreement about issues relating to the workplace that affect the parties or any employee bound by the agreement.

(3) If the collective agreement does not contain the provision described in subsection (1), it shall be deemed to contain the following consultation committee provision:

> On the request of either party, the parties shall meet at least once every 2 months until this agreement is terminated for the purpose of discussing issues relating to

the workplace that affect the parties or any employee bound of this agreement.

(4) The purpose of the consultation committee is to promote the cooperative resolution of workplace issues, to respond and adapt to changes in the economy, to foster the development of work related skills, and to promote workplace productivity.

(5) The associate chair of the Mediation Division shall on the joint request of the parties, appoint a facilitator to assist in developing a more cooperative relationship between the parties.

**Adjustment plan**

**55.** (1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies

(a) the employer shall give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and

(b) after notice has been given, the employer and trade union shall meet, in good faith, and endeavour to develop an adjustment plan, which may include provisions respecting any of the following:

(i) consideration of alternatives to the proposed measure, policy, practice or change, including amendment of provisions in the collective agreement;

(ii) human resource planning and employee counselling and retraining;

(iii) notice of termination;

(iv) severance pay;

(v) entitlement to pension and other benefits including early retirement benefits;

(vi) a bipartite process for overseeing the implementation of the adjustment plan.

(2) If, after meeting in accordance with subsection (1), the parties have agreed to an adjustment plan, it is enforceable as if it were part of the collective agreement between the employer and the trade union.

(3) Subsections (1) and (2) do not apply to the termination of the employment of employees referred to in section 49.2 of the *Employment Standards Act*.

### Division 3 – First Collective Agreement

**First collective agreement**

**56.** (1) Either party may apply to the associate chair of the Mediation Division for the appointment of a mediator to assist the parties in negotiating a first collective agreement, if

(a) a trade union certified as bargaining agent and an employer have bargained collectively to conclude their first collective agreement and have failed to do so, and

(b) the trade union has taken a strike vote under section 61 and the majority of those employees who vote have voted for a strike.

(2) If an application is made under subsection (1) an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out, unless a strike or lockout is subsequently authorized under subsection (6) (b) (iii).

(3) The associate chair must appoint a mediator within 5 days of receiving an application under subsection (1).

(4) An application under subsection (1) must include a list of the issues disputed and the position of the party making the application on those issues.

(5) Within 5 days of receiving the information referred to in subsection (4), the other party must give to the party making the application and the associate chair of the Mediation Division a list of the issues disputed and the position of that party on those issues.

(6) If the first collective agreement is not concluded within 20 days of the appointment of the mediator, the mediator shall report to the associate chair and recommend either or both of the following:

(a) the terms of the first collective agreement for consideration by the parties;

(b) a process for concluding the first collective agreement including one or more of the following:

(i) further mediation by a person empowered to arbitrate any issues not resolved by agreement and to conclude the terms of the first collective agreement;

(ii) arbitration by a single arbitrator or by the board, to conclude the terms of the first collective agreement;

(iii) allowing the parties to exercise their rights under this Code to strike or lock out.

(7) If the parties do not accept the mediator's recommended terms of settlement or if a first collective agreement is not concluded within 20 days of the report under subsection (6), the associate chair shall direct a method for resolving the dispute under subsection (6) (b).

(8) If the associate chair makes a direction under subsection (6) (b) (i) or (ii), the parties shall refrain from or cease any strike or lockout activity and the terms of the collective agreement recommended or concluded under that subsection are binding on the parties.

## PART 5

### STRIKES, LOCKOUTS AND PICKETING

**Definition**

**57.** In this Part "perishable property" includes property that

(a) is imminently subject to spoilage, or

(b) may imminently become dangerous to life, health or other property.

**Strikes and lockouts prohibited during term of collective agreement**

**58.** (1) An employee bound by a collective agreement entered into before or after the coming into force of this Code shall not strike during the term of the collective agreement, and a person shall not declare or authorize a strike of those employees during that term.

(2) An employer bound by a collective agreement entered into before or after the coming into force of this Code shall not during the term of the collective agreement lock out an employee bound by the collective agreement.

**Honouring of agreement**

**59.** Every collective agreement must provide that there will be no strikes or lockouts so long as the agreement continues to operate and, if a collective agreement does not contain such a provision, it shall be deemed to contain the following provision:

> There shall be no strikes or lockouts so long as this agreement continues to operate.

**Strikes and lockouts prohibited before bargaining and vote**

**60.** (1) A person shall not take a vote under section 61 or 62 on the question of whether to strike or on the question of whether to lock out until the trade union the employer, or their authorized representatives, have bargained collectively in accordance with this Code.

(2) A trade union shall not declare or authorize a strike and an employer shall not declare or cause a lock out, until

(a) in the case of a trade union or an employee in the unit affected, either

(i) section 61 has been complied with, or

(ii) a lawful lockout has occurred and has not been discontinued for a period longer than 72 hours, or

(b) in the case of an employer, either

(i) section 62 has been complied with, or

(ii) a lawful strike has occurred and has not been discontinued for a period longer than 72 hours.

**Pre-strike voting and notice**

**61.** (1) A person shall not declare or authorize a strike and an employee shall not strike until a vote has been taken in accordance with the regulations, of the employees in the unit affected as to whether to strike and the majority of those employees who vote have voted for a strike.

(2) If on application by a person directly affected by a strike vote or an impending strike, or on its own behalf, the board is satisfied that a vote has not been held in accordance with subsection (1) or the regulations, the board may make an order declaring the vote of no force or effect and directing that if another vote is

conducted, the vote shall be taken on the terms the board considers necessary or advisable.

(3) Except as otherwise agreed in writing between the employer or employers' organization authorized by the employer and the trade union representing the unit affected, if the vote favours a strike,

(a) a person shall not declare or authorize a strike, and an employee shall not strike, except during the 3 months immediately following the date of the vote, and

(b) an employee shall not strike unless

(i) the employer has been served with written notice by the trade union that the employees are going on strike,

(ii) written notice has been filed with the board,

(iii) 72 hours or a longer period directed under this section has elapsed from the time written notice was

(A) filed with the board, and

(B) served on the employer, and

(iv) where a mediation officer has been appointed under section 74, 48 hours have elapsed from the time the trade union is informed by the associate chair that the mediation officer has reported to him or her, or from the time required under subparagraph (iii), whichever is longer.

(4) Despite subsection (3) (b), the board may, on application or on its own motion, for the protection of

(a) perishable property, or

(b) other property or persons affected by perishable property,

direct a trade union to give more than 72 hours' notice of a strike.

(5) When the board makes a direction under subsection (4), the board

(a) shall specify the length of the written notice required, and

(b) may specify terms it considers necessary or advisable.

(6) If facilities, productions or services have been designated as essential services under section 72 and a strike that affects

those facilities, productions or services does not occur upon the expiry of the 72 hour period referred to in subsection (3) (b) or the longer period specified under subsection (5), the trade union must give a new strike notice to the employer and to the board of at least 72 hours before commencing a strike.

**Pre-lockout vote and notice**

**62.** (1) If 2 or more employers are engaged in the same dispute with their employees, a person shall not declare or authorize a lockout and an employer shall not lock out his or her employees until a vote has been taken in accordance with the regulations, of all employers, as to whether to lock out and a majority of those employers who vote have voted for a lockout.

(2) If on application by a person directly affected by a lockout vote or an impending lockout, or on its own behalf, the board is satisfied that a vote has not been held in accordance with subsection (1) or the regulations, the board may make an order declaring the vote of no force or effect and directing that if another vote is conducted the vote shall be taken on the terms the board considers necessary or advisable.

(3) Except as otherwise agreed in writing between the employer or employers' organization authorized by the employer and the trade union representing the unit affected,

(a) where a vote is taken under subsection (1) and the vote favours a lockout, a person shall not declare or authorize a lockout and an employer shall not lock out his or her employees except during the 3 months immediately following the date of the vote, and

(b) an employer shall not lock out his or her employees unless

(i) the trade union has been served with written notice by the employer that the employer is going to lock out his or her employees,

(ii) written notice has been filed with the board,

(iii) 72 hours or a longer period directed under this section has elapsed from the time written notice was

(A) filed with the board, and

(B) served on the trade union, and

(iv) where a mediation officer has been appointed under section 74, 48 hours have elapsed from the time the employers are informed by the associate chair that

the mediation officer has reported to him or her, or from the time required under subparagraph (iii), whichever is longer.

(4) Despite subsection (3) (b), the board may, on application or on its own motion, for the protection of

(a) perishable property, or

(b) other property or persons affected by perishable property,

direct an employer to give more than 72 hours' notice of a lockout.

(5) If the board makes a direction under subsection (4), the board

(a) shall specify the length of the written notice required, and

(b) may specify terms it considers necessary or advisable.

(6) If facilities, productions or services have been designated as essential services under section 72 and a lockout that affects those facilities, productions or services does not occur upon the expiry of the 72 hour period referred to in subsection (3) (b) or the longer period specified under subsection (5), the employer must give a new lockout notice to the board and the trade union of at least 72 hours before commencing a lockout.

**Continuation of benefits**

**63.** (1) If employees are lawfully on strike or lawfully locked out, their health and welfare benefits, other than pension benefits or contributions, normally provided directly or indirectly by the employer to the employees shall be continued if the trade union tenders payment to the employer, or to any person who was before the strike or lockout obligated to receive the payment

(a) in an amount sufficient to continue the employees' entitlement to the benefits, and

(b) on or before the regular due date of such payment.

(2) If subsection (1) is complied with

(a) the employer or other person referred to in that subsection shall accept the payment tendered by the trade union, and

(b) no person shall deny to an employee a benefit described in that subsection, including coverage under an insurance plan, for which the employee would otherwise be eligible,

because the employee is participating in a lawful strike or is lawfully locked out.

(3) A trade union and an employer may agree in writing to specifically exclude the operation of this section.

**Rights preserved**

**64.** (1) This Code shall not be construed to prohibit the suspension or discontinuance by an employer of operations in the employer's establishment, in whole or in part, for a cause not constituting a lockout.

(2) The burden of proof that operations in his or her establishment are or were suspended or discontinued for a cause not constituting a lockout is on the employer.

(3) An act or omission by a trade union or by the employees does not constitute a strike if

(a) it is required for the safety or health of those employees, or

(b) it is permitted pursuant to a provision of a collective agreement by which an employer agrees that employees within the bargaining unit covered by the collective agreement are not required to work in association with persons who are not members of

(i) the trade union representing the bargaining unit, or

(ii) another trade union contemplated by the collective agreement.

**Information**

**65.** A trade union or other person may, at any time and in a manner that does not constitute picketing as defined in this Code, communicate information to a person, or publicly express sympathy or support for a person, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done by that person.

**Picketing***

**66.**

**Actions**

**67.** No action or proceeding lies for

*[See Report and Appendix 4 for alternative provisions for this section.]

(a) petty trespass to land to which a member of the public ordinarily has access,

(b) interference with contractual relations, or

(c) interference with the trade, business or employment of another person resulting in a reduction in trade or business, impairment of business opportunity or other economic loss

arising out of strikes, lockouts or picketing permitted under this Code or attempts to persuade employees to join a trade union made at or near but outside entrances and exits to an employer's workplace.

**Picketing restricted**

**68.** Except as provided in this Code, a person shall not picket in respect of a matter or dispute to which this Code applies.

**Other acts not actionable**

**69.** An act done by 2 or more persons acting by agreement or combination, if done in contemplation or furtherance of a labour dispute, is not actionable unless it would be wrongful without an agreement or combination.

**Declaratory opinion**

**70.** (1) If, on the complaint by an interested person, the board is satisfied that a declaration by or on behalf of a trade union or employer, or an agreement or combination between one or more employers and one or more trade unions, or 2 or more trade unions, is substantially affecting trade and commerce in a commodity or service or is substantially affecting the business, operations or purposes of the complainant, the board may, in its discretion, issue a declaratory opinion that

(a) the declaration, agreement or combination is void for all purposes,

(b) the declaration, agreement or combination is unenforceable in specified circumstances or for a specified period of time, or

(c) the declaration, agreement or combination is valid and enforceable.

(2) When the board issues a declaratory opinion under subsection (1) (a) or (b), it may make orders or take steps it considers

advisable to ensure that persons affected by the declaration, agreement or combination are informed of the terms of the declaratory opinion.

(3) The board, in determining whether to issue a declaratory opinion under subsection (1), shall consider

(a) the extent to which the employment, business, operations, purposes or property of the complainant have been affected by the declaration, agreement or combination, and

(b) the intent and purpose of this Part and the necessity for reasonable protection and advancement of a trade union or employer.

**Refusal of order**

**71.** The board may refuse to make an order under Part 9 in respect of a matter arising under this Part if it believes it is just and equitable to do so, in view of the improper conduct of the person applying for the order.

## PART 6

### ESSENTIAL SERVICES

**Essential services**

**72.** (1) If a dispute arises after collective bargaining has commenced between the parties to a collective agreement, either of the parties may apply to the chair to investigate whether or not the dispute poses a threat to the health, safety or welfare of the residents of British Columbia and to report the results of the investigation to the minister.

(2) If the minister

(a) after receiving a report of the chair respecting a dispute, or

(b) on the minister's own initiative

considers that a dispute poses a threat to the health, safety or welfare of the residents of British Columbia, the minister may direct the board to designate as essential services those facilities, productions and services that the board considers necessary or essential to prevent immediate and serious danger to the health, safety or welfare of the residents of British Columbia.

(3) When the minister makes a direction under subsection (2) the associate chair of the mediation division may appoint one or more mediators to assist the parties to reach an agreement on essential services designations.

(4) A mediator appointed under subsection (3) shall report to the associate chair of the mediation division within 15 days of his or her appointment or within any additional period agreed on by the parties.

(5) The board

(a) shall within 30 days of receiving the report of a mediator, designate facilities, productions and services as essential services under subsection (2), and

(b) may, in its discretion, incorporate any recommendations made by the mediator into the designation under that subsection.

(6) If the minister makes a direction under subsection (2) before a strike or lockout has commenced, the parties shall not strike or lock out until the designation of essential services is made by the board.

(7) If the minister makes a direction under subsection (2) after a strike or lockout has commenced, the parties may continue the strike or lockout subject to any designation of essential services by the board.

(8) If the board designates facilities, productions and services as essential services, the employer and the trade union shall supply, provide or maintain in full measure those facilities, productions and services and shall not restrict or limit a facility, production or service so designated.

(9) A designation made under this section may be amended, varied or revoked and another made in its place, and despite section 135 the board may, in its discretion, on application or on its own motion, decline to file its order in a Supreme Court registry.

**Return to work**

**73.** (1) Every employer, trade union or employee affected by a direction or designation made under section 72 with respect to the dispute shall comply with the direction or designation.

(2) If a designation is made under section 72, the relationship between the employer and his or her employees shall, while the direction or designation remains in effect, be governed by the terms and conditions of the collective agreement last in force between the employer and the trade union except as that collective agreement is amended by the board to the extent necessary to implement the designation of essential services.

(3) The board may under section 72 designate facilities, productions and services supplied, provided or maintained by employees of the employer who are represented by another trade union that is not involved in a collective bargaining dispute with the employer.

## PART 7

### MEDIATION AND DISPUTES RESOLUTION

### Division 1 – Mediation and Fact Finding

**Mediation officer and services**

**74.** (1) The associate chair of the mediation division may appoint a mediation officer if

(a) notice has been given to commence collective bargaining between a trade union and an employer,

(b) either party makes a written request to the associate chair to appoint a mediation officer to confer with the parties to assist them to conclude a collective agreement or a renewal or revision of it, and

(c) the request is accompanied by a statement of the matters the parties have or have not agreed on in the course of collective bargaining.

(2) A person appointed as a mediation officer need not be an employee of the board.

(3) The minister may at any time during the course of collective bargaining between an employer and a trade union, if he or she considers that the appointment is likely to facilitate the making of a collective agreement, appoint a mediation officer to confer with the parties.

(4) If a mediation officer is appointed to confer with the parties, the mediation officer shall, no later than 10 days after first meeting with the parties or 20 days after the mediation

officer's appointment, whichever is sooner, or such longer period as the parties agree on or as the minister directs, report to the associate chair setting out the matters on which the parties have or have not agreed and such other information as the mediation officer considers relevant to the collective bargaining between the parties.

(5) If either party so requests of the associate chair, or if the minister so directs, the mediation officer shall provide to the associate chair and the parties a report concerning the collective bargaining dispute and the report may include recommended terms of settlement.

(6) Parties conferring with a mediation officer under this section shall provide the information concerning their collective bargaining that the mediation officer requests.

**Notice of strike or lockout**

**75.** (1) If a strike or lockout has commenced, the trade union or employer commencing the strike or lockout shall immediately inform the chair in writing specifying the date the strike or lockout commenced.

(2) The chair must inform the minister of strikes and lockouts that occur or are threatened.

**Special mediator**

**76.** (1) The minister may appoint a special mediator, and specify terms of reference for the special mediator, to assist the parties in settling the terms and conditions of a collective agreement or a renewal or revision of a collective agreement, as the case may be.

(2) The minister may terminate the appointment of a special mediator.

(3) The special mediator must keep the minister informed as to the progress of the mediation.

(4) The special mediator, in carrying out his or her duties under this Code, has the protection, privileges and powers of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

**Fact finding**

**77.** (1) The associate chair may appoint a fact finder in respect of a collective bargaining dispute, and the associate chair shall give written notice of the appointment to each of the parties to the dispute.

(2) Within 7 days after receiving the notice of the appointment of the fact finder, each party shall give written notice to the fact finder and the other party setting out all matters the parties have agreed on for inclusion in a collective agreement and all matters remaining in dispute between the parties.

(3) Where a party fails to comply with subsection (2), the fact finder may make a determination of the matters mentioned in subsection (2).

(4) It is the duty of a fact finder to confer with the parties and to inquire into, ascertain and make a report to the associate chair setting out the matters agreed on by the parties for inclusion in an agreement and the matters remaining in dispute between the parties.

(5) The fact finder may include in his or her report his or her findings in respect of any matter that he or she considers relevant to the making of a collective agreement between the parties.

**Last offer votes**

**78.** (1) Before the commencement of a strike or lockout, the employer of the employees in the affected bargaining unit may request that a vote of those employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, and where the employer requests that a vote be taken, the associate chair shall direct that a vote of those employees to accept or reject the offer be held in a manner the associate chair directs.

(2) Before the commencement of a strike or lockout, the trade union that is certified as the bargaining agent of the employees in the affected bargaining unit may, where more than one employer is represented in the dispute by an employers' organization, request that a vote of those employers be taken as to the acceptance or rejection of the offer of the trade union last received by the employers' organization in respect of all

matters remaining in dispute between the parties, and if the trade union requests that a vote be taken the associate chair shall direct that a vote of those employers to accept or reject the offer be held in a manner the associate chair directs.

(3) If a vote under this section favours the acceptance of a final offer, an agreement is thereby constituted between the parties.

(4) The holding of a vote or a request for the taking of a vote under subsection (1) or (2) does not extend any time limits or periods provided for in section 61 or 62.

(5) Not more than one vote in respect of the same dispute shall be held under subsection (1) and not more than one vote in respect of the same dispute shall be held under subsection (2).

(6) If, during a strike or lockout, the minister considers that it is in the public interest that the employees in the affected bargaining unit be given the opportunity to accept or reject the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, the minister may direct that a vote of the employees in the bargaining unit to accept or reject the offer be held forthwith in a manner the minister directs.

(7) If, during a strike or lockout, more than one employer is represented in the dispute by an employers' organization and the minister considers that it is in the public interest that the employers comprising the employers' organization be given the opportunity to accept or reject the offer of the bargaining agent for the employees last received by the employers' organization in respect of all matters remaining in dispute between the parties, the minister may direct that a vote of the employers comprising the employers' organization to accept or reject the offer be held forthwith in a manner the minister directs.

## Division 2 - Commissions and Councils

### Industrial inquiry commission

**79.** (1) The minister may, on application or on his or her own motion, make or cause to be made the inquiries considered advisable respecting labour relations matters, and subject to this Code and regulations, may do the things he or she considers necessary to maintain or secure labour relations stability and promote conditions favourable to settlement of disputes.

(2) For any of the purposes of subsection (1), or where in an industry a dispute between employers and employees exists or is likely to arise, the minister may refer the matter to an industrial inquiry commission for investigation and report.

(3) An industrial inquiry commission shall consist of one or more members appointed by the minister.

(4) The minister shall furnish the industrial inquiry commission with a statement of the matters to be inquired into, and if an inquiry involves particular persons or parties, shall advise them of the appointment of the industrial inquiry commission.

(5) An industrial inquiry commission shall inquire into the matters referred to it by the minister and endeavour to carry out its terms of reference, and if a settlement is not effected in the meantime, shall report the result of its inquiries and its recommendations to the minister within 14 days after its appointment, or within a further time the minister specifies.

(6) On receipt of a report of an industrial inquiry commission relating to a dispute between employers and employees, the minister shall furnish a copy to each of the parties affected, and shall publish it in the manner considered advisable.

(7) The members of an industrial inquiry commission have the power and authority of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

(8) If either before or after the report the parties agree in writing to accept the report in respect of the matters referred to the industrial inquiry commission, the parties are bound by the report in respect of those matters.

**Industry advisory councils**

**80.** The minister may, on application or on his or her own motion, establish industry advisory councils considered appropriate to examine labour management relations in those industries and recommend to the minister and other interested persons or groups measures that may contribute to the improvement of those relations, including measures to achieve more effective collective bargaining and procedures for settling disputes.

# PART 8

## ARBITRATION PROCEDURES

### Division 1 – Interpretation and Purpose

**Definitions**

**81.** In this Part

"arbitration board" includes

(a) a single arbitrator, or

(b) another tribunal or body appointed or constituted under this Part or a collective agreement;

"arbitration bureau" means the Collective Agreement Arbitration Bureau established under this Part;

"director" means the director of the arbitration bureau;

"issue" means, in respect of an award, to make and publish the award to the parties to the arbitration;

"settlement officer" means an employee appointed under the *Public Service Act* who is designated as a settlement officer by the director.

**Purpose of Part**

**82.** (1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.

(2) An arbitration board, to further the purpose expressed in subsection (1), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.

### Division 2 – Collective Agreement Arbitration Bureau

**Collective Agreement Arbitration Bureau**

**83.** (1) The Collective Agreement Arbitration Bureau is established consisting of a director and other employees appointed under the *Public Service Act*.

(2) The director shall establish and maintain a register of arbitrators.

(3) The minister shall appoint a joint advisory committee consisting of

(a) 2 persons representative of trade unions,

(b) 2 persons representative of employers,

(c) 2 persons representative of arbitrators, and

(d) the director, who shall chair the committee.

(4) The joint advisory committee shall advise the director on

(a) the training and education of labour arbitrators and settlement officers,

(b) research and publication of information concerning labour arbitrations, and

(c) the establishment and maintenance of a register of arbitrators.

### Division 3 – Collective Agreement Provisions

**Dismissal or arbitration provision**

**84.** (1) Every collective agreement shall contain a provision governing dismissal or discipline of an employee bound by the agreement, and that or another provision shall require that the employer have a just and reasonable cause for dismissal or discipline of an employee; but this section does not prohibit the parties to a collective agreement from including in it a different provision for employment of certain employees on a probationary basis.

(2) Every collective agreement shall contain a provision for final and conclusive settlement without stoppage of work, by arbitration or another method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.

(3) If a collective agreement does not contain a provision referred to in subsections (1) and (2), the collective agreement is deemed to contain those of the following provisions it does not contain:

(a) the employer shall not dismiss or discipline an employee bound by this agreement except for just and reasonable cause;

(b) if a difference arises between the parties relating to the dismissal or discipline of an employee, or to the interpretation, application, operation or alleged violation of this agreement, including a question as to whether a matter is arbitrable, either of the parties, without stoppage of work, may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference to arbitration, and the parties shall agree on a single arbitrator, the arbitrator shall hear and determine the difference and issue a decision, which is final and binding on the parties and any person affected by it.

**Unworkable provision**

**85.** (1) If in the minister's opinion a part of the arbitration provision in a collective agreement, including the method of appointing the arbitration board, is inadequate, or the provision set out in section 84 (3) (b) is alleged by either party to be unsuitable, the minister may at the request of either party modify the provision so long as it conforms with section 84 (1) and (2).

(2) Until modified under subsection (1), the arbitration provision in the collective agreement, or in section 84 (3) (b), as the case may be, applies.

**Failure to appoint arbitrators**

**86.** (1) Despite section 85, if there is failure to appoint or constitute an arbitration board under a collective agreement or under section 84 (3), the director, at the request of either party, shall make the appointments necessary to constitute an arbitration board, and a person so appointed by the director shall be deemed appointed in accordance with the collective agreement, or under section 84 (3), as the case may be.

(2) Nothing in a collective agreement shall be construed as requiring the director to constitute an arbitration board consisting of more than a single arbitrator.

**Settlement officer**

**87.** (1) Either party to the collective agreement, within 45 days of the completion of the steps of the grievance procedure preceding a reference to arbitration, may request the director in writing to appoint a settlement officer to confer with the parties to assist

them to settle the difference, if the request is accompanied by a statement of the difference to be settled.

(2) If a settlement officer is appointed under subsection (1), the settlement officer shall, within 5 days of the appointment or within such further time as the director may allow,

(a) inquire into the difference,

(b) endeavour to assist the parties in settling the difference, and

(c) report to the director on the results of the inquiry and the success of the settlement effort.

(3) When the director receives a report under subsection (2) and the parties have not settled the difference, the director may refer the difference back to the parties.

**Action by Labour Relations Board**

**88.** If a difference arises during the term of a collective agreement, and in the board's opinion delay has occurred in settling it or it is a source of industrial unrest between the parties, the board may, on application by either party to the difference, or on its own motion,

(a) inquire into the difference and make recommendations for settlement, and

(b) if the difference is arbitrable, order that it be immediately submitted to a specified stage or step in the grievance procedure under the collective agreement or, whether the difference is arbitrable or not, request the minister to appoint a special officer.

**Authority of arbitration**

**89.** For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement, and without limitation, may

(a) make an order fixing and determining the monetary value of an injury or loss suffered by an employer, trade union or other person as a result of a contravention of a collective agreement, and directing a person to pay a person all or part of the amount of that monetary value,

(b) order an employer to reinstate an employee dismissed in contravention of a collective agreement,

(c) order an employer or trade union to rescind and rectify a disciplinary action taken in respect of an employee that was imposed in contravention of a collective agreement,

(d) determine that a dismissal or discipline is excessive in all circumstances of the case and substitute other measures that appear just and equitable,

(e) relieve, on just and reasonable terms, against breaches of time limits or other procedural requirements set out in the collective agreement,

(f) dismiss or reject an application or grievance, or refuse to settle a difference, where in the arbitration board's opinion, there has been unreasonable delay by the person bringing the application or grievance, or requesting the settlement, and the delay has operated to the prejudice or detriment of the other party to the difference,

(g) interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, despite that its provisions conflict with the terms of the collective agreement, and

(h) encourage settlement of the dispute and, with the agreement of the parties, the arbitration board may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

**Fees and costs**

**90.** (1) Unless the provision required under section 84 or 85 provides otherwise, each party to an arbitration under section 84, 85, 104 or 105 shall bear

(a) its own fees, expenses and costs,

(b) the fees and expenses of a member of an arbitration board that is appointed by or on behalf of that party, and

(c) equally the fees and expenses of the chair of the arbitration board or a single arbitrator, unless the arbitration board allows another individual to participate in the hearing in which case the arbitration board may direct that a portion of the costs of the fees and expenses of the chair be borne by such a person.

(2) If the director appoints a single arbitrator or the chair of an arbitration board under section 86, each party shall pay 1/2 the remuneration and expenses of the person appointed, unless the arbitration board allows another individual to participate in

the hearing in which case the arbitration board may direct, at the commencement of the hearing, that a portion of the costs of the fees and expenses of the chair be borne by such a person.

(3) If the director appoints a member of an arbitration board under section 86, on failure of one of the parties to make the appointment, that party shall pay the remuneration and expenses of the person appointed.

**Delay by arbitration board**

**91.** If a difference has been submitted to arbitration and a party to the arbitration complains to the minister that the arbitration board has failed to render a decision in a reasonable time, the minister may, after consulting the parties and the arbitration board, issue an order the minister considers necessary to ensure a decision will be rendered without further undue delay.

**Powers of arbitration board**

**92.** (1) An arbitration board may

(a) determine its own procedure,

(b) receive and accept evidence and information on oath, affidavit or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law,

(c) determine prehearing matters and issue prehearing orders,

(d) enter during regular working hours any land, ship, vessel, vehicle, aircraft or other means of conveyance or transport, factory, workshop or place of any kind where

(i) work is or has been done or commenced by employees,

(ii) an employer carries on business, or

(iii) anything is taking place or has taken place concerning a matter referred to the arbitration board under this Code,

and may inspect any work, material, appliance, machinery, equipment or thing in it, and interrogate any person in relation to it, and

(e) authorize a person to do anything the arbitration board may do under paragraph (d) and report to the arbitration board in the presence of the parties or their representatives as a witness subject to cross examination by each party.

(2) The jurisdiction of an arbitration board to hear and determine a difference does not cease until the matters in dispute have been finally resolved.

**Summons to testify**

**93.** (1) An arbitration board may, at the request of a party to the arbitration or on its own motion, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce the documents and things it considers requisite to a full consideration of matters before the arbitration board, in the same manner as a court of record in civil cases.

(2) Where an arbitration board consists of more than one person, the chair of the arbitration board may exercise all the authority of the arbitration board under subsection (1).

**Decision of arbitration board**

**94.** Where a collective agreement provides for submission of a difference to an arbitration board consisting of more than one arbitrator, the decision of a majority of the arbitrators shall be the decision of the arbitration board, but if there is no majority decision, the decision of the chair of the arbitration board shall be the decision of the arbitration board.

**Effect of decision**

**95.** The decision of an arbitration board is binding

(a) on the parties,

(b) in the case of a collective agreement between a trade union and an employers' organization, on the employers bound by the agreement who are affected by the decision,

(c) in the case of a collective agreement between a council of trade unions and an employer or an employers' organization, on the council, the constituent trade unions in it and the employer or employers covered by the agreement, who are affected by the decision, and

(d) on the employees bound by the collective agreement who are affected by the decision,

and they shall comply in all respects with the decision.

**Filing decision**

**96.** An arbitration board shall, within 10 days of issuing an award, file a copy of it with the director who shall make the award available for public inspection.

**Act not to apply**

**97.** The *Commercial Arbitration Act* does not apply to an arbitration under this Code.

**Reference to Labour Relations Board**

**98.** An arbitration board may, at any stage of an arbitration, refer to the board for a binding opinion and decision a question of labour relations policy or interpretation of this Code arising in the course of the arbitration.

**Appeal jurisdiction of Labour Relations Board**

**99.** (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board, or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that

(a) a party to the arbitration has been or is likely to be denied a fair hearing, or

(b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

(2) An application to the board under subsection (1) must be made in accordance with the regulations.

**Appeal jurisdiction of Court of Appeal**

**100.** On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award where the basis of the decision or award is a matter or issue of the general law not included in section 99 (1).

**Decision final**

**101.** Except as provided in this Part, the decision or award of an arbitration board under this Code is final and conclusive and is not open to question or review in a court on any grounds whatsoever, and no proceedings by or before an arbitration board shall be

restrained by injunction, prohibition or other process or proceeding in a court or be removable by certiorari or otherwise into a court.

**Enforcement**

**102.** If a party, employer, trade union or employee has failed or neglected to comply with the decision of an arbitration board, a party, employer, trade union or employee affected by it may, after the expiration of 14 days from the date of the release of the decision or the date provided in the decision for compliance, whichever is later, file in the Supreme Court registry a copy of the decision in the prescribed form, and the decision shall be entered as if it were a decision of the court, and on being entered shall be deemed, for all purposes except an appeal from it, to be an order of the Supreme Court and enforceable as such.

**Share of cost of grievance recommendations**

**103.** If a collective agreement contains the following provision:

> Where a difference arises between the parties relating to the dismissal, discipline or suspension of an employee, or to the interpretation, application, operation or alleged violation of this agreement, including any question as to whether a matter is arbitrable, during the term of the collective agreement [here insert name], or a substitute agreed to by the parties, shall at the request of either party
>
> (a) investigate the difference,
>
> (b) define the issue in the difference, and
>
> (c) make written recommendations to resolve the difference
>
> within 30 days of the date of receipt of the request and, for those 30 days from that date, time does not run in respect of the grievance procedure.

the Minister of Finance and Corporate Relations, on the minister's requisition, shall pay out of the consolidated revenue fund 1/3 of the cost incurred by the parties for payment of reasonable remuneration, travelling and out of pocket expenses of the person named or his or her substitute.

## Division 4 – Expedited Arbitration

**Expedited arbitration**

**104.** (1) A party to a collective agreement may refer a difference respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable, to the director for resolution by expedited arbitration.

(2) No difference shall be referred to the director under this section unless

(a) the grievance procedure under the collective agreement has been exhausted, and

(b) the application is made within 45 days of the completion of the steps of the grievance procedure preceding a reference to arbitration.

(3) No difference under a collective agreement shall be referred to the director under this section if

(a) the difference has been referred to arbitration under the collective agreement by the party who wishes to refer it under this section, or

(b) the time, if any, stipulated in or permitted under the collective agreement for referring the difference to arbitration has expired.

(4) If a difference is referred to the director within the time periods specified in this section, the director

(a) shall appoint an arbitrator to hear and determine the matter arising out of the difference,

(b) shall fix the date on which the hearing will commence by the arbitrator, which date must be within 28 days of the day on which the difference was referred to the director, and

(c) may, if a party so requests and the other party agrees, appoint a settlement officer to assist the parties in settling the grievance before the hearing.

(5) If a settlement officer is appointed under subsection (4), the settlement officer shall, within 5 days of the appointment or within such further time as the director may allow,

(a) inquire into the difference,

(b) endeavour to assist the parties in settling the difference, and

(c) report to the director on the results of the inquiry and the success of the settlement effort.

(6) If the parties are unable to settle the difference, the arbitrator appointed under subsection (4) shall proceed to hear and determine the matter arising out of the difference and shall,

subject to subsection (7), issue a decision within 21 days after the conclusion of the hearing.

(7) If jointly requested to do so by the parties to the difference, the arbitrator appointed under subsection (4) shall, if possible, issue an oral decision within one day after the conclusion of the hearing and shall issue written reasons within the time specified in subsection (6).

(8) An arbitrator appointed under subsection (4) has all the power and jurisdiction of an arbitrator appointed under this Code or the collective agreement between the parties to the difference.

(9) This section applies to every party to a collective agreement and every person bound by a collective agreement, despite any provision in the collective agreement.

(10) The other provisions of this Part apply to an arbitration under this section, with the modifications necessary to accommodate appointments and expedited processes under this section.

**Consensual mediation-arbitration**

**105.** (1) Despite any grievance or arbitration provision in a collective agreement or deemed to be included in the collective agreement under section 84 (3), the parties to the collective agreement may, at any time, agree to refer one or more grievances under the collective agreement to a single mediator-arbitrator for the purpose of resolving the grievances in an expeditious and informal manner.

(2) The parties shall not refer a grievance to a mediator-arbitrator unless they have agreed on the nature of any issues in dispute.

(3) The parties may jointly request the director to appoint a mediator-arbitrator if they are unable to agree on one, and the minister shall make the appointment.

(4) Subject to subsection (5), a mediator-arbitrator appointed by the director shall begin proceedings within 28 days after being appointed.

(5) The director may direct a mediator-arbitrator to begin proceedings on such date as the parties jointly request.

(6) The mediator-arbitrator shall endeavour to assist the parties to settle the grievance by mediation.

(7) If the parties are unable to settle the grievance by mediation, the mediator-arbitrator shall endeavour to assist the parties to agree on the material facts in dispute and then shall determine the grievance by arbitration.

(8) When determining the grievance by arbitration, the mediator-arbitrator may limit the nature and extent of evidence and submissions and may impose such conditions as he or she considers appropriate.

(9) The mediator-arbitrator shall give a succinct decision within 21 days after completing proceedings on the grievance submitted to arbitration.

(10) Sections 90 to 103 apply in respect of a mediator-arbitrator and a settlement, determination or decision under this section.

### Division 5 - Special Officer

**Special officer**

**106.** (1) If during the term of a collective agreement there is a dispute or difference arising out of or relating to the agreement, or a likelihood of such a dispute or difference, the minister may in the interest of industrial peace appoint a special officer.

(2) On his or her appointment, the special officer shall investigate the dispute or difference and may

(a) confer with the parties,

(b) hold hearing,

(c) make recommendations,

(d) make orders he or she considers necessary or advisable, including, without limitation, orders that the dispute or difference be submitted to a specified stage or step in the grievance procedure under the collective agreement, or

(e) arbitrate the dispute or difference himself or herself.

**Effect of order**

**107.** An order made by a special officer is binding on all persons bound by the collective agreement and all parties to the dispute or difference.

**Interim order**

**108.** Where a special officer makes an order on a matter not provided for by the collective agreement, or which differs from the provisions of the collective agreement, the order is binding on the parties to the dispute or difference for a period not exceeding 30 days.

**Powers**

**109.** For the purpose of investigating a dispute or difference or holding a hearing, a special officer has the powers of a commissioner under sections 12, 15 and 16 of the *Inquiry Act* and may enter during regular working hours any land, ship, vessel, vehicle, aircraft or other means of conveyance or transport, factory, workshop or place of any kind where

(a) work is or has been done or commenced by employees,

(b) an employer carries on business, or

(c) anything is taking place or has taken place concerning a matter referred to the special officer under this Code

and may inspect any work, material, appliance, machinery, equipment or thing in it, or interrogate any person in relation to it.

**Evidence**

**110.** For the purpose of a hearing, a special officer

(a) may receive and accept the evidence and information on oath, affidavit or otherwise that, in his or her discretion, he or she considers advisable, whether admissible as evidence in a court of law or not, and

(b) shall determine his or her own procedure, but shall give an opportunity to an interested party to present evidence and make representations.

**Frequency of appointment**

**111.** The minister shall not appoint a special officer more than twice in connection with the same dispute or difference.

**Form of order**

**112.** (1) An order of a special officer shall be in writing signed by the special officer.

(2) The special officer shall promptly

(a) deliver a copy of his or her order to the board, the employer and the trade union, and

(b) take reasonable steps to communicate the provisions of his or her order to persons bound or affected by it.

**Notice of appointment to be sent to board**

**113.** The minister shall send to the board a copy of every appointment of a special officer under section 106.

**Other divisions to apply**

**114.** The other provisions in this Part apply to matters arising under this Division.

## PART 9

### LABOUR RELATIONS BOARD

**Labour Relations Board**

**115.** (1) The Industrial Relations Council is continued as the Labour Relations Board.

(2) All business pending before the Industrial Relations Council before the coming into force of this subsection shall be continued before the Labour Relations Board and may be dealt with by the division of the board that the chair considers appropriate to that business.

(3) The board shall consist of a chair, vice chairs and as many other members equal in number representative of employers and employees respectively, as the Lieutenant Governor in Council considers proper, all of whom shall be appointed by the Lieutenant Governor in Council.

(4) The chair may designate one of the vice chairs to act in the chair's absence, and while acting the vice chair has the power and authority of the chair.

**Divisions and officers of the Labour Relations Board**

**116.** (1) There shall be 2 divisions of the board called the Mediation Division and the Adjudication Division.

(2) The chair shall designate one of the vice chairs of the board as associate chair of the Mediation Division and one of the vice chairs as associate chair of the Adjudication Division, and shall designate another vice chair as registrar of the board.

(3) If the associate chair of a division is absent or unable to act, or the office of an associate chair is vacant, the chair may act as associate chair or may assign a vice chair of the board to act.

(4) The chair may change an assignment or designation under this section.

**Panels**

**117.** (1) The chair may establish one or more panels of the board, and a panel has the power and authority of the board in matters referred to the panel by the chair or coming before it under rules of the board made under this Code.

(2) Two or more panels may proceed with separate matters at the same time.

(3) The chair may refer a matter that is before the board to a panel or a matter that is before a panel to the board or another panel.

(4) A panel of the board shall consist of

(a) the chair or a vice chair,

(b) the chair and 2 or more vice chairs,

(c) 3 or more vice chairs,

(d) 3 or more vice chairs and members, equal in number, representative of employers and employees respectively,

(e) the chair or a vice chair, and one member representative of employees and one member representative of employers, or

(f) the chair or a vice chair, and members, equal in number, representative of employers and employees respectively.

(5) The chair may terminate an appointment to a panel and may fill any vacancy on a panel.

**Quorum**

**118.** (1) The board or a panel of the board shall not proceed with a matter unless a quorum is present and remains present throughout the proceeding.

(2) A quorum of the board consists of the chair or a vice chair, and members, equal in number, representative of employers and employees.

(3) A quorum of a panel consists of the chair or the vice chair, if appointed under section 117 (4) (a), or all members of the panel, including the chair or vice chair.

**Proceedings**

**119.** (1) The chair shall preside at proceedings of the board and of all panels of which he or she is a member, and a vice chair shall preside over all other panels.

(2) The decision of a majority of the members of the board or of a panel present at a proceeding is the decision of the board or panel, but if there is no majority, the decision of the chair or presiding vice chair governs.

**Question of law**

**120.** The chair may establish a panel to which the board or another panel may refer a question of law respecting the interpretation of this Code, and its ruling is binding on the board or on the other panel.

**Delegation**

**121.** (1) The chair may exercise any power or perform any duty or function of the board, an associate chair or member of the board.

(2) The chair may delegate to the associate chairs, the registrar and one or more of the other members a power, duty or function of the board.

**Employees and expenses**

**122.** (1) The board may, despite the *Public Service Act*, employ a secretary and other officers and employees it considers necessary for the purposes of this Code, and may determine their duties, conditions of employment and remuneration.

(2) This Code and the *Public Service Labour Relations Act* do not apply to the members of the board or the secretary, or the officers and employees of the board.

(3) The chair shall designate an employee employed under subsection (1) as the information officer to advise the public with respect to this Code and its application to labour relations in British Columbia.

**Powers of board**

**123.** The board and each member of it has the power and authority of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

**Evidence**

**124.** (1) The board may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law.

(2) The board may request and receive a report from a person it appoints to investigate an application or to investigate and attempt to settle a dispute under this Code, a collective agreement or the regulations, and the board shall disclose the report to the parties.

(3) Information relating to membership or any record that may disclose whether a person is or is not a member of a trade union produced in a proceeding before the board is for the exclusive use of the board and its representatives.

(4) No person shall, except with the consent of the board, disclose whether a person is or is not a member of a trade union.

**Summons and discovery of documents**

**125.** On the recommendation of an officer appointed under section 14, 87 or 104 (4) (c), or on its own motion, the board may summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce the documents and things the officer or the board considers requisite to a full investigation and consideration of matters within the board's jurisdiction in the same manner as a court of record in civil cases.

**Practice and procedure**

**126.** (1) The board shall determine its own practice and procedure, but shall give full opportunity to the parties to a proceeding to present evidence and make submissions.

(2) The board, subject to the minister's approval, may make rules governing its practice and procedure and the exercise of its powers and establish forms it considers advisable.

**Offices of the board**

**127.** (1) The principal office of the board shall be at or near Vancouver, and the board and panels of the board shall sit at the places the chair decides.

(2) Documents may be filed with the board at its principal office or at other offices throughout British Columbia designated for that purpose by the chair.

**Publication of decisions**

**128.** The board must render its decisions within a reasonable period of time and make all its decisions in proceedings under this Code available in writing for publication.

**Oath of office**

**129.** A member of the board, before acting as a member, shall take and subscribe before a notary public or commissioner for taking affidavits for British Columbia, and file with the minister, an oath or affirmation of office in the following form:

I, _____, do solemnly swear (affirm) that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, execute and perform the office of chair (or vice chair or member) of the Labour Relations Board, and will not, except in the discharge of my duties, disclose to any person any of the evidence or other matter brought before the board.

**Vacancies**

**130.** (1) The Lieutenant Governor in Council may appoint a person to fill a vacancy in the board.

(2) If a member of the board resigns or his or her appointment terminates, he or she may carry out and complete duties or responsibilities and continue to exercise powers that he or she may have had if he or she had not ceased to be a member, in

relation to a proceeding in which he or she participated as a member of the board, until the proceeding is completed.

**Compensation and conditions of service**

**131.** (1) The chair shall hold office for a term of not less than 5 years specified by the Lieutenant Governor in Council and shall not be removed before the expiration of that term except by an Act or resolution of the Legislature.

(2) The chair and the vice chairs and other members of the board shall be paid compensation directed by the minister.

(3) The chair and the vice chairs and other members of the board shall be reimbursed for actual and reasonable travelling and out of pocket expenses incurred by them in the discharge of their duties.

(4) The minister, on behalf of the government, may make a contract with the chair, vice chairs or other members of the board containing mutually agreed terms and conditions not inconsistent with this Code.

**General guidelines**

**132.** (1) The board may formulate general guidelines to further the operation of this Code; but the board is not bound by those guidelines in the exercise of its powers or the performance of its duties.

(2) In formulating general guidelines the board may request that submissions be made to it by any person.

(3) The board shall make available in writing for publication all general guidelines formulated under this section, and their amendments and revisions.

**Hearing of complaint**

**133.** (1) If, on application or complaint by any interested person, under section 14, this section or another provision of this Code or regulations, or on its own motion, the board is satisfied that any person has contravened this Code, a collective agreement or the regulations, it may, in its discretion, do one or more of the following:

(a) order a person to do any thing for the purpose of complying with this Code, a collective agreement or the regulations, or

to refrain from doing any act, thing or omission in contravention of this Code, a collective agreement or the regulations;

(b) order a person to rectify a contravention of this Code or the regulations;

(c) refuse to make an order, despite a contravention of this Code, a collective agreement or the regulations, if the board believes it is just and equitable to do so in view of the improper conduct of the person making the application or complaint;

(d) except in relation to conduct regulated by Part 5, make an order determining and fixing the monetary value of an injury or loss suffered by a person as a result of a contravention of this Code, a collective agreement or the regulations, and directing a person to pay to the person suffering the injury or loss the amount of that monetary value;

(e) order an employer to reinstate an employee discharged in contravention of this Code, a collective agreement or the regulations;

(f) make another order or proceed in another manner under this Code, consistent with section 2, that the board considers appropriate.

(2) If a request is made to the board to exercise its discretion under section 66 or another provision conferring on the board a discretion to prohibit, restrict, confine, regulate, control, direct or require the performance of any act or thing, the board may exercise its discretion and make an order, impose conditions or proceed in a manner it considers to be in furtherance of the purposes set out in section 2.

(3) If at any time before or during a proceeding the board or a person appointed by it is able to settle all or part of the differences between the parties to a proceeding on terms not contrary to this Code, a collective agreement or the regulations, the board may issue a consent order setting out the terms of settlement agreed to by the parties, and this consent order has the same force and effect as an order under subsection (1).

(4) If in the board's opinion an application or complaint is without merit, it may reject the application or complaint at any time.

(5) If an application or complaint is made under this section the board may, in its discretion, after giving each party to the matter an opportunity to be heard, make an interim order pending a final resolution of the application or complaint.*

(6) If the board is satisfied in any proceedings under this Code that a mistake has been made in naming or not naming a person as a party to the proceeding the board may direct that the name of the person be substituted, added or deleted as a party to the proceedings.

**Conditions and undertakings**

**134.** (1) If the board makes or may make a decision or order under this Code, it may require, at any time before or after or both before and after the making of the decision or order, that

(a) certain conditions specified by the board be observed or performed, or

(b) the applicant or complainant undertake to act or refrain from acting in a manner specified by the board.

(2) A breach of an undertaking or a refusal or neglect to observe or perform a condition specified by the board under subsection (1) is a contravention of this Code.

**Filing order in Supreme Court**

**135.** (1) The board shall on request by any party or may on its own motion file in a Supreme Court registry at any time a copy of a decision or order made by the board under this Code, a collective agreement or the regulations.

(2) The decision or order must be filed as if it were an order of the court, and on being filed it shall be deemed for all purposes except appeal from it to be an order of the Supreme Court and enforceable as such.

(3) For the purposes of this section, a designation or direction under Part 6 is deemed to be a decision or order of the board.

**Jurisdiction of board**

**136.** (1) Except as provided in this Code, the board has and shall exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.

*[John Baigent disagrees with this recommendation. See Appendix 4 ]

(2) Without limiting the generality of subsection (1), the board has and shall exercise exclusive jurisdiction in respect of

(a) a matter in respect of which the board has jurisdiction under this Code or regulations, and

(b) an application for the regulation, restraint or prohibition of a person or group of persons from

(i) ceasing or refusing to perform work or to remain in a relationship of employment,

(ii) picketing, striking or locking out, or

(iii) communicating information or opinion in a labour dispute by speech, writing or other means.

**Jurisdiction of court**

**137.** (1) Except as provided in this section, no court has or shall exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 or a matter referred to in section 136, and, without limitation, no court shall make an order enjoining or prohibiting an act or thing in respect of them.

(2) This Code shall not be construed to restrict or limit the jurisdiction of a court, or to deprive a court of jurisdiction to entertain a proceeding and make an order the court may make in the proper exercise of its jurisdiction where a wrongful act or omission in respect of which a proceeding is commenced causes immediate danger of serious injury to an individual or causes actual obstruction or physical damage to property.

(3) Despite this Code or any other Act, a court shall not order an injunction to restrain a person from striking, locking out or picketing, or from doing an act or thing in respect of a strike, lockout, dispute or difference arising from or relating to a collective agreement, on an ex parte application.

(4) A court of competent jurisdiction may award damages for injury or losses suffered as a consequence of conduct contravening Part 5 if the board has first determined that there has been a contravention of Part 5.

**Finality of decisions and orders**

**138.** A decision or order of the board under this Code, a collective agreement or the regulations on a matter in respect of which the

board has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.

**Jurisdiction of board to decide certain questions**

**139.** The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without restriction, any question as to whether

(a) a person is an employer or employee,

(b) an organization or association is an employers' organization or a trade union,

(c) a collective agreement has been entered into,

(d) a person is or what persons are bound by a collective agreement,

(e) a person is or what persons are parties to a collective agreement,

(f) a collective agreement has been entered into on behalf of a person,

(g) a collective agreement is in full force and effect,

(h) a person is bargaining collectively or has bargained collectively in good faith,

(i) an employee or a group of employees is a unit appropriate for collective bargaining,

(j) an employee belongs to a craft or group exercising technical or professional skills,

(k) a person is a member in good standing of a trade union,

(l) a person is included in or excluded from an appropriate bargaining unit,

(m) an employee or group of employees is included in a sector for the purpose of an application under section 21,*

(n) a sector has been historically underrepresented by trade unions within the meaning of section 21,*

(o) an employer is included in or excluded from an accreditation,

(p) a person is a dependent contractor,

(q) an organization of trade unions is a council of trade unions,

*[Tom Roper disagrees with this recommendation. See Appendix 3.]

(r) a service is essential for the purposes of Part 6,

(s) a person or organization is a professional strike breaker,

(t) a trade union, council of trade unions or employers' organization is fulfilling a duty of fair representation,

(u) a site or place is a site or place of business, operations or employment of an employer,

(v) a person is an ally,

(w) a person is a professional,

(x) a person exercises technical or professional skills, and

(y) an activity constitutes a strike, lockout or picketing.

**General powers of board**

**140.** The board, in relation to a proceeding or matter before it, has power to

(a) summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce the documents and things the board considers necessary to a full investigation and consideration of a matter within its jurisdiction that is before it in the proceeding,

(b) administer oaths and affirmations,

(c) examine, in accordance with rules of the board, evidence submitted to it respecting the membership of an employee in a trade union seeking certification,

(d) examine documents forming or relating to the constitution or articles of association of

(i) a trade union seeking certification,

(ii) a trade union forming part of a council of trade unions seeking certification, or

(iii) an employers' organization seeking accreditation,

(e) examine records and make inquiries it considers necessary,

(f) require an employer to post and keep posted in appropriate places a notice the board considers necessary to bring to the attention of employees a matter relating to the proceeding,

(g) enter, during regular working hours, any land, ship, vessel, vehicle, aircraft or other means of conveyance or transport, factory, workshop or place of any kind where

(i) work is or has been done or commenced by employees,

(ii) an employer carries on business, or

(iii) anything is taking place or has taken place concerning a matter referred to it under this Code,

and may inspect any work, material, appliance, machinery, equipment or thing in it and interrogate any person in relation to it,

(h) order that

(i) a representation vote be taken, in accordance with Part 3 and the regulations, among employees affected by the proceeding, before or after a hearing the board may conduct in respect of the proceeding, and

(ii) ballots cast in the vote be sealed in ballot boxes and not counted until the parties to the proceeding have been given an opportunity to be heard by the board,

(i) enter an employer's premises to conduct representation votes during working hours,

(j) authorize a person to do anything the board may do under paragraphs (b) to (g) or paragraph (i) and report to the board,

(k) adjourn or postpone the proceeding,

(l) abridge or enlarge the time for instituting the proceeding or for doing an act, filing a document or presenting evidence in the proceeding,

(m) amend or permit amendment of a document filed in the proceeding, and

(n) add a party to the proceeding at any stage.

**Reconsideration of decisions**

**141.** (1) On application by any party affected by a decision of the board, the board may grant leave to that party to apply for reconsideration of the decision.

(2) Leave to apply for reconsideration of a decision of the board may be granted if the party applying for leave satisfies the board that

(a) evidence not available at the time of the original decision has become available, or

(b) the decision of the board is inconsistent with the principles expressed or implied in this Code or in any other Act dealing with labour relations.

(3) Leave to apply for reconsideration of a decision of the board under this section may be granted only once in respect of that decision.

(4) Subsection (1) does not apply to a decision of the board to grant or deny leave under subsection (2) or to a decision made by the board on reconsideration.

(5) An application under subsection (1) must be made within 15 days of the publication of the reasons for the decision that is the subject of the application.

(6) If an application for leave is made under subsection (1), another party affected by the decision may apply for leave under that subsection within

(a) the period referred to in subsection (5), or

(b) 5 days of receiving the application,

whichever is longer.

(7) On reconsideration under this section the board may vary or cancel the decision that is the subject of reconsideration and may remit the matter to the original panel.

(8) An application under this section must be made in accordance with the regulations.

**Variation and continuation of certification or accreditation**

**142.** The board, on application by any party or on its own motion, may vary or cancel the certification of a trade union or the accreditation of an employers' organization.

**Declaratory opinion**

**143.** The board, on application by an employer or trade union, or on its own motion, may give a declaratory opinion on a matter arising under this Code if it considers it appropriate to do so.

## PART 10

### MISCELLANEOUS

**Powers of minister**

**144.** For the purpose of obtaining information to which the minister is entitled under this Code, the minister or a person designated by the minister has and may exercise the power and authority of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

**Power to enter and inspect**

**145.** The minister or a person designated by the minister may, for the purposes of this Code, enter during regular working hours any land, ship, vessel, vehicle, aircraft or other means of conveyance or transport, factory, workshop or place of any kind where

(a) work is or has been done or commenced by employees,

(b) an employer carries on business, or

(c) anything is taking place or has taken place concerning a matter referred to the minister under this Code,

and may inspect any work, material, appliance, machinery, equipment or thing in it, or interrogate any person in relation to it.

**Information confidential**

**146.** (1) The minister may receive and hold in confidence a proposal made by a party for settlement of a dispute or difference.

(2) If information relates to the business or affairs of any person, whether or not a party to a dispute, difference or other reference, the minister, if he or she believes disclosure of the information would be prejudicial to the person, may direct that the information shall not be made public or that it be made public in the manner he or she directs.

(3) Information obtained for the purpose of this Code in the course of his or her duties by a member of the board, an industrial inquiry commission or other tribunal under this Code, a special officer, a mediator or other person appointed under this Code, an employee of any of them, or an employee under the administration of the minister shall not be open to inspection by a person or a court, and the member, special officer, mediator or other person appointed under this Code or employee shall not be required by a court or tribunal to give evidence relative to it.

**Payment of members of tribunals**

**147.** A person appointed by the minister or the chair as a member of an industrial inquiry commission, committee of special advisors, industry advisory council or other tribunal established under this Code, or as a special officer, special mediator or fact finder shall be reimbursed for reasonable travelling and out of pocket expenses incurred by the person, and may be paid remuneration the minister determines for each day's attendance in carrying out his or her duties under this Code.

**Execution of documents**

**148.** For the purposes of this Code, an application to the minister, a notice requiring an employer and a trade union to negotiate or a collective agreement may be signed if it is made, given or entered into

(a) by an employer who is an individual, by that employer or where several individuals are joint employers, by a majority of them,

(b) if the employers are represented by an employers' organization authorized by the employers, by the president and secretary of the employers' organization or any 2 of its officers or by a person authorized by resolution passed at a meeting of the employers' organization,

(c) by a corporation, by one of its authorized managers or by one or more of its principal executive officers, and

(d) by a trade union, by its president and secretary, by any 2 of its officers or by a person authorized by resolution passed at a meeting of the trade union.

**Board may require returns**

**149.** (1) The board may direct a trade union or employers' organization that is a party to an application for certification or to an existing collective agreement to file with the board

(a) an affidavit signed by its president, secretary or another official stating the names and addresses of its officers, and

(b) a copy of its constitution and bylaws,

and the trade union or employers' organization shall comply with the direction within the time specified by the board.

(2) The board may direct an employer that is party to an application for certification or to an existing collective agreement to file with the board

(a) an affidavit signed by the president, secretary or another official stating the names and addresses of any directors and principal administrative officers, and

(b) a statement setting out the nature of the employer's business and the location of his or her business or operations.

**Trusteeship over local unions**

**150.** (1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby the autonomy of the subordinate trade union under the constitution or bylaws of the provincial, national or international trade union is suspended, shall, within 60 days after it has assumed supervision or control over the subordinate trade union, file with the board a statement, verified by the statutory declaration of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, on the direction of the board, file such additional information concerning such supervision and control as the chair requires.

(2) If a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, that supervision or control shall not continue for more than 12 months from the date of such assumption without the consent of the board.

**Financial statements**

**151.** (1) A trade union and an employers' organization shall make available without charge to each of its members, before June 1 in each year, a copy of the audited financial statement of its affairs to the end of the last fiscal year, signed by its president and treasurer or corresponding principal officers.

(2) The financial statement must contain information in sufficient detail to disclose accurately the financial condition and operation of the trade union or employers' organization for its preceding fiscal year.

(3) The board, on the complaint of a member that the trade union or employers' organization has failed to comply with subsection

(1), may order the trade union or employers' organization to file with the board, in the time set out in the order, a statement in a form and with particulars the board determines.

(4) The board may order a trade union or employers' organization to furnish a copy of a statement filed under subsection (3) to the members of the trade union or employers' organization that the board, in its discretion, directs, and the trade union or employers' organization shall comply with the order.

**Mailed notice presumed received**

**152.** (1) For the purpose of this Code or a proceeding under it, a notice or other communication sent by mail shall be presumed to have been received by the addressee in the ordinary course of mail unless the contrary is proved.

(2) Every party to a dispute shall give written notice to the minister, the board and the other parties of the address of its principal or other office in British Columbia to which it wishes notices to be sent.

**Service of documents**

**153.** A notice, order or other paper or document required to be served for the purpose of this Code may be served by delivering it to or at the residence of the person on whom it is to be served or, where that person is an employer or a trade union, by delivering it or a true copy of it to the employer's agent or to the trade union's place of business during normal business hours.

**Legal entity**

**154.** Every trade union and every employers' organization is a legal entity for the purposes of this Code.

**Evidentiary effect of documents**

**155.** A document purporting to contain or to be a copy of a regulation or order of the minister or the board, and purporting to be signed by the minister or a member of the board, shall be accepted by a court as proof of the regulation, rule, direction, order or other matter of which it purports to be a copy without proof of the signature of the minister or member of the board or of his or her appointment.

**Technicalities not to invalidate proceedings**

**156.** A proceeding under this Code or a collective agreement shall not be considered invalid by reason of a defect in form, a technical

irregularity or an error of procedure that does not result in a denial of natural justice, and the board, arbitration board, industrial inquiry commission, special officer, court or other tribunal may relieve against those defects, irregularities or errors of procedure on just and reasonable terms.

**Reports**

**157.** (1) The board may report to the minister and shall report to him or her on his or her request, and the minister may authorize the board to publish its report.

(2) The board shall, on or before March 1 each year, make a report to the minister for the preceding calendar year, setting out briefly

(a) all applications to the board under this Code and summaries of the findings of the board on them,

(b) other matters the board considers to be of public interest in the discharge of its duties under this Code, and

(c) other information the minister directs.

(3) The report referred to in subsection (2) must be laid before the Legislative Assembly as soon as is practicable.

**Penalty**

**158.** A person who refuses or neglects to observe or carry out an order made under this Code is liable on conviction,

(a) if an individual, to a fine not exceeding $1 000, or

(b) if a corporation, trade union or employers' organization, to a fine not exceeding $10 000.

**Regulations**

**159.** (1) The Lieutenant Governor in Council may make regulations.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations

(a) respecting applications for certification under Part 3,

(b) respecting voting under this Code,

(c) respecting application for reconsideration under section 141, and

(d) prescribing requirements for evidence of membership in good standing in a trade union.

(3) A regulation made by the Lieutenant Governor in Council with respect to voting under this Code may, without limitation,

(a) require employers to supply information and records and to allow the use of facilities owned by the employer, and

(b) prescribe, with respect to ballots used in votes on the question of whether to strike or on the question of whether to lock out, the form in which the question on the ballots is to be worded.

## PART 11

### TRANSITIONAL PROVISIONS AND REPEAL

**Transitional**

**160.** Despite the repeal of the *Industrial Relations Act*, all regulations, certifications, accreditations, orders or directions of the Lieutenant Governor in Council, the minister, the Industrial Relations Council or another official made under the *Industrial Relations Act* remain in full force and effect until repealed, revoked, amended or varied under this Code.

**Transitional - membership cards**

**161.** If a trade union applies during the 90 day period after the coming into force of this section for certification on the basis of membership in good standing evidenced by membership cards signed before the coming into force of section 23, the board may order that a representation vote be taken in accordance with the regulations.

**Transitional - regulations**

**162.** (1) The Lieutenant Governor in Council may make regulations considered necessary or advisable for the purpose of more effectively bringing into operation this Code and to obviate any transitional difficulties encountered in so doing, and without limiting the generality of this, the regulations may for a period the Lieutenant Governor in Council specifies, suspend the operation of a provision of an enactment if that provision would impede the effective operation of this Code.

(2) Unless earlier repealed, a regulation under subsection (1) is repealed one year after it is enacted.

**Repeal***

**163.** (1) The *Industrial Relations Act, R.S.B.C. 1979, c. 212,* is repealed by regulation of the Lieutenant Governor in Council.

(2) That part of section 60 of the *Industrial Relations Reform Act, 1987, S.B.C. 1987, c. 24,* that enacts sections 137.97 to 137.99 of the *Industrial Relations Act* is repealed.

**Commencement***

**164.** This Code comes into force by regulation of the Lieutenant Governor in Council.

*[By referring to repeal and commencement by regulation it is our understanding that these provisions are required in order to allow for an orderly transition from the *Industrial Relations Act* to this Code.]

PROVINCE OF BRITISH COLUMBIA

# ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

*Order in Council No.* *, Approved and Ordered*

*Lieutenant Governor*

**DRAFT 1**

**Executive Council Chambers, Victoria**

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that B.C. Reg. 247/87, the Industrial Relations (Voting) Regulation, is amended as set out in the attached Schedule.

Minister of Labour and Consumer Services and Minister Responsible for Constitutional Affairs

Presiding Member of the Executive Council

*(This part is for administrative purposes only and is not part of the Order.)*

**Authority under which Order is made:**

Act and section:- Industrial Relations Act, sections 50, 150

Other (specify):- O.C. 1478/87

August 4, 1992

92 13 aaa

# DRAFT VOTING REGULATION

Contents

Section

1. Interpretation

PART 1

VOTES DIRECTED BY BOARD

2. Application
3. Appointment of returning officer
4. Duties of returning officer
5. Duties of scrutineers
6. Duties of employers, employees and trade unions
7. Distribution of results

PART 2

STRIKE AND LOCKOUT VOTE

8. Application
9. Appointment and duties of returning officer
10. Vote complete
11. Copy of return to be sent to board
12. Names and addresses of employees
13. Preservation of ballots

PART 3

GENERAL

14. Application
15. Mailed vote
16. Variation of requirements

SCHEDULE 1

SCHEDULE 2

**Interpretation**

**1.** In this regulation "Code" means the *Labour Relations Code*.

## PART 1

### VOTES DIRECTED BY BOARD

**Application**

**2.** This Part applies to a vote that is directed to be taken by the board under the Code.

**Appointment of returning officer**

**3.** The board may appoint a returning officer to conduct the taking and counting of the vote.

**Duties of returning officer**

**4.** (1) The returning officer may appoint deputy returning officers and clerks and may delegate to the deputy returning officers any or all of the powers and duties set out in subsection (2).

(2) Subject to the Code and this regulation, the returning officer shall

(a) set the date, time and place or places for taking the vote and ensure that every person eligible to vote has a reasonable opportunity to do so,

(b) subject to direction from the board, determine the list of persons eligible to vote,

(c) subject to direction from the board, set the form of ballot,

(d) fix the number and location of polling places, each of which shall contain private polling booths or private spaces for voting,

(e) prepare and post notices relating to the vote in forms set by the board,

(f) invite employers and trade unions affected by the vote each to appoint, in writing, a scrutineer to be present at the taking and counting of the vote, and where the vote is a representation vote ordered by the board under the Code, also invite the applicant employees to appoint, in writing, one additional scrutineer to be present at the taking and counting of the vote,

(g) if required, obtain from the employer 4 copies of a certified list of the names and, if required, the addresses of all employees in the unit,

(h) furnish to each scrutineer a list of persons eligible to vote,

(i) prior to balloting, examine the ballot box in the presence of the scrutineers, if any, remove the contents, if any, and then secure it,

(j) keep a record of the persons to whom ballots are issued,

(k) provide for the deposit in a sealed envelope identified by name of the voter, of a ballot cast by a person whose eligibility to vote has been contested,

(l) ensure that the vote is conducted in accordance with the Code to ensure the privacy of the voter, the secrecy of the ballot and maintenance of the general rules of voting set out in Schedule 1,

(m) at the close of the poll but prior to opening the ballot box, refer any contested ballot to the board for decision,

(n) following the board's decision with respect to any contested ballot, open the ballot box and count the ballots in the presence of the scrutineers, if any,

(o) upon the completion of the vote, and with the scrutineers present, if any, promptly prepare a return of poll in a form set by the board, sign it and file a copy with the registrar,

(p) forward to the person designated by the returning officer the ballot box or boxes containing marked ballots, unused ballots, notices of poll, letters of appointment of scrutineers, all voters' lists and a copy of the return of poll, and

(q) give such special directions or instructions as the returning officer considers necessary for the proper conduct of the vote.

**Duties of scrutineers**

**5.** It is the duty of every scrutineer to

(a) contest the right of a person to vote if there is valid reason for doing so,

(b) assist the returning officer or deputy returning officer in counting the ballots,

(c) sign the return of poll or the statement and return of poll, whichever is applicable, and retain one copy, and

(d) deliver to the returning officer or deputy returning officer used voters lists in his possession.

**Duties of employers, employees and trade unions**

**6.** Every employer, employee and trade union involved or having an interest in the outcome of the vote must cooperate with the returning officer and deputy returning officer and comply with any direction validly given by either of them, including a direction to the employer to supply information and records and to make available the use of facilities owned by the employer.

**Distribution of results**

**7.** (1) The return of poll indicating the results of the vote, including the number of ballots cast and the number of votes for, against or spoiled, shall be made available by the board to

(a) the trade union and employer affected,

(b) employees in the bargaining unit, and

(c) such other persons as the board may direct.

(2) The board may require the returning officer to give a copy of return of poll to the trade union or employer affected and to post copies of the statement and return of poll in the locations where the notices of the vote were posted.

## PART 2

### STRIKE AND LOCKOUT VOTE

**Application**

**8.** This Part applies to matters under sections 61 and 62 of the Code.

**Appointment and duties of returning officer**

**9.** (1) A bargaining agent for which a vote is being held must appoint a returning officer to act under subsection (2) for the purposes of the vote and set the date, times and places for voting and provide eligible persons with not less than 48 hours notice of where to vote.

(2) Subject to the Code and this regulation, the returning officer must

(a) set the form of ballot and ensure that it poses the following question, as applicable, in these words:

Are you in favour of a strike: Yes _____ No _____.

Are you in favour of a lockout: Yes _____ No _____.

(b) act as scrutineer and if necessary appoint additional scrutineers to be present while ballots are cast and counted,

(c) prepare a voters list and keep a record of the persons to whom ballots are issued,

(d) fix the number and location of polling places,

(e) resolve questions concerning eligibility of voters,

(f) ensure that the vote is conducted by secret ballot and, that there is compliance with Schedule 1, and

(g) prepare and sign a return of poll in the form set out in Schedule 2 and give a copy of it to the bargaining agent.

**Vote complete**

**10.** For the purpose of sections 61 and 62 of the Code, a vote shall be deemed to have been taken when the bargaining agent receives the copy of the return of poll from the returning officer.

**Copy of return to be sent to board**

**11.** When the bargaining agent receives a return of poll from the bargaining agent, it must promptly send a copy of the return of poll to the board.

**Names and addresses of employees**

**12.** An employer must give the returning officer the names and addresses of all its employees in the bargaining unit immediately after receiving a written request for this information from the returning officer.

**Preservation of ballots**

**13.** The bargaining agent must preserve all documents relating to a vote for not less than 3 months from the last day of the vote.

## PART 3

### GENERAL

**Application**

**14.** This Part applies to the votes held under Parts 1 and 2.

**Mailed vote**

**15.** Where in the opinion of the returning officer a mailed vote should be conducted, the following conditions apply in addition to those set out in Parts 1 and 2:

(a) the returning officer shall

(i) furnish each person eligible to vote with

(A) a ballot,

(B) a letter setting out the information on which the vote is being held, instructions for voting and the time for return,

(C) a blank envelope with the word "ballot" printed on it, and

(D) an addressed envelope for the return of the ballot, containing a space in the upper left hand corner for the signature of the voter,

(ii) designate the time and place for counting the ballots and so notify the scrutineers, if any, and the board, and

(iii) in the presence of the scrutineers, if any, deposit in the ballot box the unopened ballot of each eligible voter;

(b) a ballot that is

(i) not received within the time specified by the returning officer for the taking of the vote, or

(ii) returned in an unsigned envelope

must not be counted;

(c) a ballot forwarded to a voter by the returning officer in the ordinary course of mail is deemed to have been received by that voter.

**Variation of requirements**

**16.** If the returning officer reports to the board that,

(a) under the circumstances, it is impossible or impractical to comply strictly with this regulation, or

(b) there has been an omission or impediment in carrying out this regulation, or in complying with the time allowed to do any act,

the board may make orders varying or suspending a provision that is not inconsistent with the Code and is necessary for the purpose of facilitating and regularizing the casting and counting of the vote while maintaining the privacy of the voter and the secrecy of the ballot.

## SCHEDULE 1

### General Rules Of Voting

1. After receiving a ballot from the returning officer, the voter shall, in the polling booth or space provided, mark it with an "X" in the square provided opposite to the division for which he or she desires to vote, fold the ballot and, in the presence of the returning officer or deputy returning officer, scrutineers, if any, deposit the ballot in the box and then leave the premises.

2. Ballots that are not marked or have on them writing or a mark other than "X" must be declared spoiled, except where the voter has by some other mark, in the opinion of the returning officer or deputy returning officer, clearly indicated an intention, in which case the returning officer or deputy returning officer, whose decision shall be final, may declare the ballot not spoiled and count it accordingly.

3. No person other than the voter, for the time that it takes to vote, is permitted in the polling booth or the allocated space.

## SCHEDULE 2

### RETURN OF POLL

1. Number of ballots issued: ☐
2. Number of ballots returned: ☐
3. Number in favour: ☐
4. Number against: ☐
5. Number of ballots spoiled: ☐

I certify that this vote has been conducted in accordance with the Voting Regulation under the *Labour Relations Code* and that the information in this Return of Poll is correct.

Dated _____ Signed _____
Returning Officer

_____
Name of Employer

_____
Name of Bargaining Agent

PROVINCE OF BRITISH COLUMBIA

# ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

*Order in Council No.* *, Approved and Ordered*

*Lieutenant Governor*

**Executive Council Chambers, Victoria**

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the attached Membership Evidence Regulation is made.

Minister of Labour and Consumer Services
and Minister Responsible for
Constitutional Affairs

Presiding Member of the Executive Council

*(This part is for administrative purposes only and is not part of the Order.)*

**Authority under which Order is made:**

Act and section:- Labour Relations Code s.

Other (specify):-

August 25, 1992

92 88 aaa

# DRAFT MEMBERSHIP EVIDENCE REGULATION

**Criteria for membership**

**1.** For the purpose of establishing membership in good standing in the trade union, the following minimum criteria apply:

(a) a membership card must contain the following statement:

> In applying for a membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining. ;

(b) a membership card must be signed and dated at the time of signature;

(c) a membership card must be signed, or membership activity maintained by dues payments, within 90 days of an application for certification.

**Revocation of membership cards**

**2.** A membership card may be revoked by delivering a written statement signed by the member to the trade union with a copy to the Labour Relations Board on or before the date of application for certification.

**Commencement**

**3.** Section 1 (a) comes into force 90 days after the day on which section 23 of the *Labour Relations Code* comes into force.

# Appendix 2

## Secondary Boycott Agreements - Tom Roper

I do not concur with the recommendation to eliminate the existing provision in the **Act** dealing with secondary boycott agreements (Section 4.1). Sections 4.1 and 9.1 prohibit collective agreement clauses which restrict the employer from doing business with, or using the products of, another employer. Such clauses would include those which restrict subcontracting to unionized firms or which allow employees to refuse to handle or work with non-union products.

I propose an amendment to the existing Section 4.1 to add the words "or refrain from" to the phrase " . . . to cease doing business with another person". With that amendment, Section 9.1 could be deleted, as the proscription in Section 4.1 would cover the subject matter of Section 9.1.

The deletion of Section 9.1 from the legislation should not invalidate non-affiliation clauses. Such clauses have historically been recognized as valid and enforceable in the construction industry, given the unique nature of that industry and the legitimacy of such clauses to enforce union security on a construction site: see **R.M. Hardy & Associates Ltd. and Teamsters Local 213** [1977] 2 Can LRBR 357. Non-affiliation clauses in the construction industry are preserved by the "Rights Preserved" section of the proposed legislation.

The opponents of Section 4.1 argue that it interferes with freely negotiated terms of a collective agreement — that an employer and a union should be free to reach an agreement on any matter including how, or with whom, the employer will do business. The freedom to bargain is certainly an attractive argument but, in my view, falls short of recognizing other fundamental rights recognized in the Code.

The problem with secondary boycott agreements is that they can interfere with, and in some cases eliminate, the right of other employees to *freely* choose whether or not they wish to be members of a trade union. These clauses can force "top down" organizing on other companies. Suppliers to unionized industries may, effectively, be forced to unionize if the customer concluded a collective agreement which required that union products be utilized or that work only be contracted to union firms. While one can say that an employer and union should be able to enter into any agreement they like, it is the effect of such an agreement which is objectionable, either because it excludes business (non-union business) from the market, or because it forces businesses to unionize if they wish to participate in the market. In my view those effects are inconsistent with the purposes of the **Act**.

The existing Section 4.1, however, arguably has an "overreaching" effect in that it would invalidate clauses in collective agreements which allow employees to refuse to handle products produced during a lawful strike or lockout. Our legislation recognizes the validity of a hot declaration during a lawful strike or lockout. However, although the dissemination of a hot declaration is permitted, the existing secondary boycott provision would invalidate clauses in collective agreements which allow employees to refuse to handle hot goods. Hot declarations have been held to be valid to the extent that they purport to replicate picketing rights. Thus, if a trade union could lawfully picket an employer's operation, then it is lawfully entitled to issue a hot declaration against the products produced by that operation.

In order to bring the existing secondary boycott provision into line with the right of a union to issue a valid hot declaration, I recommend the following provision:

> *"(1) An express or implied provision in an agreement between an employer and a trade union by which the employer ceases or refrains, or agrees to cease or refrain from handling, using, buying, selling, transporting or otherwise dealing in the products of another employer or to cease or refrain from doing business with another person is void, except where such provision applies to another employer or person involved in a lawful strike or lockout.*
>
> *(2) No employer and no trade union shall include in any agreement a provision that is, under subsection (1), void.*
>
> *(3) A provision of an agreement is not void by reason only that is recognizes the right to refuse to cross a picket line."*

Taking my comments regarding hot declarations a little further, one can see why a secondary boycott agreement should be prohibited in circumstances other than in a lawful strike or lockout. As previously stated, our law has historically held hot declarations or unfair declarations to be valid only in circumstances where a union and employer are engaged in a *lawful* labour dispute. Prior to the introduction of Section 4.1, our Labour Relations Board held that an unfair or hot declaration issued for organizational purposes was invalid: see for example ***Britco Structures Ltd.*** [1982] 3 Can.LRBR 67; application for reconsideration dismissed BCLRB No. 3/83. However, in a decision immediately predating the introduction of Section 4.1, the Board went so far as to hold that a secondary boycott declaration

> *"... may be legitimately used by or on behalf of a trade union to assist it in meeting unfair competition from employers who are underbidding unionized employers based on their paying their employees substandard rates of pay and working conditions." [Nikolai Manufacturing Inc. BCLRB 18/87; appeal of No.224/86]*

Employers saw this decision as taking beyond reasonable limits the notion of a lawful unfair declaration and the right of employees to rely on a secondary boycott agreement to refuse to handle a company's products. On what basis could it be said that competition is "unfair" simply because it emanates from a non-union firm? While, from one perspective, an unfair declaration against a non-union company could be seen as protecting work for unionized firms, from another perspective it has a direct organizing purpose: to take the non-union business out of the market or, conversely, to allow the non-union business into the market *if* its employees become unionized.

A secondary boycott agreement has the effect of implicitly declaring "hot" the products or services of those businesses to which the secondary boycott agreement is directed. Indeed, a secondary boycott agreement can be more effective than an express "hot" declaration in that the third party may never become aware of the agreement or its effect on the third party's business. Just as the use of hot or unfair declarations should be restricted to a

lawful labour dispute. secondary boycott agreements (which have the same effect) should be likewise restricted.

One might consider the objection to secondary boycott agreements from another perspective. by considering an agreement between an employer and its employees which prohibits the employer from dealing with unionized firms. Could it not be said that such an agreement constitutes an inappropriate interference with the rights of employees to organize?

The National Labour Relations Act in the United States has ruled secondary boycott agreements to be illegal. Although other legislation in Canada does not contain a provision such as the existing Section 4.1. secondary boycott agreements have been struck down where they have been used for organizing purposes.

For all of these reasons. I recommend that the attached provision be enacted.

## Secondary Boycott Agreements Prohibited

(1) An express or implied provision in an agreement between an employer and a trade union by which the employer ceases or refrains, or agrees to cease or refrain from handling, using, buying, selling, transporting or otherwise dealing in the products of another employer or to cease or refrain from doing business with another person is void, except where such provision applies to another employer or person involved in a lawful strike or lockout.

(2) No employer and no trade union shall include in any agreement a provision that is, under subsection (1), void.

(3) A provision of an agreement is not void by reason only that is recognizes the right to refuse to cross a picket line.

# Appendix 3

## Sectoral Certification - Tom Roper

I strongly recommend against the acceptance of the recommendation regarding sectoral certification. In my submission, such a provision is not consistent with the mandate of the Sub-Committee and, if adopted, would upset the balance in the legislation.

Our consensus report would, in my opinion, result in legislation which fairly recognizes the legitimate rights and interests of management, trade unions and employees with minimum interference in the collective bargaining process. The proposed sectoral certification concept would swing the pendulum in favour of trade unions in a way that can neither be justified by the mandate given to this Sub-Committee nor by the submissions which were made to it. Moreover, of the 296 written submissions and 203 individual oral presentations to the Sub-Committee (the majority of which were made on behalf of unions or union organizations), only a very few proposed sectoral certification.

Our mandate was to recommend a fair and balanced piece of legislation which would improve labour relations in the Province, to enhance investment and allow B.C. to maintain a competitive position in a global economy. This proposal on sectoral certification meets none of those objectives.

First, it would permit employees to elect to impose, on their employer, a collective agreement considered to be "standard" in a particular sector of the economy. Employees could elect to negotiate as a bargaining unit with their own employer to achieve a collective agreement which both parties accept as being responsive to that particular workplace; or, if the employees felt that they would benefit by doing so, they could unilaterally opt to be included within a sectoral certification and have a collective agreement imposed on their employer. Their employer would not have that option. Rather, the employer would be forced into a collective agreement that had not been negotiated for that particular workplace, and one which that employer may not be prepared to accept.

Such a result is inconsistent with the purposes which our Sub-Committee has recommended should provide the foundation for the legislation. Specifically, this proposal does not encourage the practice and procedure of collective bargaining between employers and trade unions, nor does it promote conditions favourable to the orderly, constructive and expeditious settlement of disputes. Rather, it provides a mechanism whereby a collective agreement can be imposed on an employer.

Most employers and trade unions would agree that the imposition of a collective agreement through first contract interest arbitration is not the best way to start a collective bargaining relationship. That is why we have recommended a process for first contract resolution with a heavy emphasis on mediation. Contrary to that thrust, the sectoral certification proposal would not only result in an imposed collective agreement, but would result in the imposition of a collective agreement that was not designed for the particular employer affected. Simply stated, the proposed sectoral certification provision is not good for labour relations.

In my view, the proposed concept is also investment-negative. Small business is one of the primary engines of the economy of this Province, and it is small business which this provision would affect. New investors in small business will think twice about investing in the Province if they know that, if their

employees become unionized, the employer may have no say in determining the cost of labour or in determining workplace practices. Given that labour is often the most significant cost to small business, this is a significant concern.

It has been said many times that capital is mobile and will be attracted to a friendly environment. If investors see the prospect of sectoral certification as a negative, which I believe they will, they will choose any other jurisdiction in Canada (save for Quebec) which has no such provision in its labour legislation.

Sectoral organizing also poses unhealthy economic consequences for the Province. Small businesses, which operate with small margins and face strong competition from producers outside of the Province, will be at a significant disadvantage if they cannot individually determine a collective agreement that is in the best interests of their own business and their own employees. Within the Province, sectoral organizing can create a cartel problem with negative consequences for consumers. In ***Governing the Workplace, the Future of Labour and Employment Law*** (Harvard University Press, 1990), Paul Weiler discusses the extent to which collective bargaining distorts the operation of the labour market. While he discounts inflated generalizations about the monopoly power of trade unions, he argues that the organization of a product market creates a serious cartel problem:

> *"A final argument is that although a union might not be able directly to control consumers in their product choices, it can do indirectly by organizing all the firms that can satisfy a particular consumer demand. To my mind, this is the only serious cartel problem presented by collective bargaining. Organization of the entire product market is especially serious because it can sharply reduce the incentive to resist rich wage demands, even for large employers that have the economic resources to do so. If all the employers in a product market have confidence that a union which represents both them and their competitors will secure a common wage settlement — through either coalition bargaining with an employers' association (like the Teamsters with the trucking firms) or pattern bargaining (like the UAW with the auto manufacturers) — there is no reason for any one of these firms to absorb the immediate financial costs of taking a strike in pursuit of reasonable long-term settlements. Its higher wages can simply be passed on to consumers as a uniform ingredient of the product price — and this economic rent in the wage rate will, in turn, produce the undesirable allocative and distributional consequences sketched earlier."*
> *(at page 130).*

Finally the proposed sectoral certification provision moves in the opposite direction from the emerging trend in labour relations. That trend is towards enterprise bargaining. In those cases where industry agreements have been successful, the success has occurred because employers have *voluntary* formed their own associations, or voluntarily remain within an association. Otherwise, the trend is toward enterprise-based collective bargaining. This trend has been described by Weiler (supra) in the following terms:

> *"If, as I suspect is the case, this new brand of enterprise unionism is better attuned to the growing worker need for personal involvement and to the*

*employer need for flexible adjustment, the leadership of the union movement will have to start down that path if unions hope to have any real chance of improving their current bleak prospects. And it is at least possible that such a sharply altered style of collective bargaining could reduce the degree of resistance to this institution among American workers, if not American managers, thereby expend the quality of worker influence inside the firm, and perhaps even lessen the political and judicial incentive to proliferate external legal regulation to fill the present vacuum in workplace governance." (page 37)*

* * *

*"As we have seen, a growing number of scholarly observers believe that in the future American industry and work will be channelled into smaller, more flexible organizations. If that forecast holds true, the further consequence for unionism will be the unravelling of the tradition pattern of centralized bargaining for hundreds of thousands of auto workers, steel workers, long-distance truckers, and the like. **Unions in these sectors will be forced to negotiate agreements that will be responsive to the special features not simply of individual firms, but of individual plants and locations within a firm.... This emerging model of enterprise unionism will be far more conducive to direct worker involvement in the life of the plant or office ..."** (pages 222 and 223, emphasis added)*

To the extent that a sectoral certification model seeks to address problems which unions have in organizing small workplaces, or in obtaining first collective agreements, those problems have been adequately addressed, in my submission, in the proposed modification to the definition of "unit" and in the procedure which we have recommended for first contract resolution. Both of those amendments would enhance a union's ability to certify small workplaces, including places where only a single employee works, and achieve a collective agreement. With these changes there is no need for a sectoral certification model with its infringement on free collective bargaining at the enterprise level.

In summary, it is my recommendation that the proposed sectoral certification concept not be adopted. It is inconsistent with the mandate of the Sub-Committee, inconsistent with good labour relations and with encouraging investment in the Province. It would upset the delicate balance which must otherwise exist in the legislation.

A submission was made by the Construction Labour Relations Association to our Sub-Committee proposing a bargaining structure for the construction industry. My comments on the proposed sectoral certification model should not be taken as commenting on the appropriateness of a particular bargaining model in the construction industry. Given the nature of employment in construction, where employees are dispatched by trade unions, largely organized on craft lines, to any number of employers in the course of a year, a sectoral bargaining model may well be appropriate given the peculiarities of that industry. Our Sub-Committee has not investigated the appropriateness of such a model in the construction industry, nor does the sectoral certification model proposed in this report address the construction industry.

The existing legislation contains a provision for multi-employer certification where the Board determines that the proposed bargaining unit of employees, employed by two or more employers, is appropriate for collective bargaining and where all employers consent to the application. That Section (existing Section 40) has been in the legislation since 1984. It is my recommendation that it be retained.

# Appendix 4

## Picketing - John Baigent

Our Sub-Committee is in agreement on some recommendations concerning picketing; significant differences of opinion remain.

By way of a useful background in considering our recommendations it is important to keep in mind that the current Bill 19 provisions on the subject are more restrictive than legislation anywhere else in Canada. British Columbia is the only province — save for Alberta — where employees are not entitled to picket non-struck "secondary" locations of their employer. British Columbia is the only jurisdiction which explicitly requires that common site picketing (two employers at the same location) be restricted. Finally, ours is the only jurisdiction in Canada that restricts picketing by striking employees — even at a primary site of employment — if the picketing interferes with another non-struck division of the *same* employer at that location.

The recommendations proposed by each of us prohibit picketing at secondary locations of an employer during a strike or lockout. By Canadian standards that is a major restriction on a union's common law right to picket. In my view it is an acceptable restriction only if employers are to be denied the use of replacement workers during a strike or lockout.

I agree that neutral employers should be insulated, as much as possible, from the effects of legal picketing. The language of the present statute allows the Council to insulate a neutral employer by eliminating an employee's right to picket where he or she works. My proposal would direct the Labour Relations Board to restrict the picketing to insulate neutral common site employers provided that any restriction does not eliminate an employee's right to picket the place where he or she works.

My strongest disagreement with the present legislation occurs where two or more divisions of a struck employer operate at the same location. The present legislation treats the two divisions as separate employers and restricts picketing if it affects the non-struck "division". In the case of an employer with two different "divisions" at the same location I would not restrict the legal picketing in any way.

If union members are to be prohibited from *any* picketing at secondary locations of a struck employer, the fair corollary of that position is an unfettered right to picket where they do work, i.e. the primary site. The notion that two divisions of one employer should be considered as two separate employers even when they operate at the same site has never been accepted in Canadian labour legislation or in the common law. The Ontario cases referred to in Tom Roper's discussion of this issue deal with picketing different divisions of an employer *at different locations*. The situation is different at a shared location because then the restraint can only be achieved by compromising the right of employees to picket the one place our legislation now permits them to picket — their place of employment.

When divisions of a company share a common location, they invariably do so because each division benefits from the proximity of the other. Therefore, it does not appear unfair that each "division" should be treated as part of a common enterprise for the purposes of defining the role of picketing. I emphasize that if we are to restrict employees to picketing at their place of employment, that is a major departure from Canadian standards. The right ought not to be further eroded by allowing picketing at their place of employment. In my view, the fiction of treating two divisions of one corporation as if they were separate legal entities should have no place in legislation that depends for its success on the perceived fairness of its provision.

I have attached to these comments a proposed draft of legislation which reflects my recommendations. Those recommendations follow the wording of the present legislation. I have proposed what I consider to be minor changes to the definition of "ally" and to the definition of a primary site. The changes are self-evident and I need not comment on them. I would allow striking employees to picket all operations of an ally — not just where the ally performs "struck work".

Two other comments are necessary. The present legislation allows for hearings of picketing disputes within 24 hours after application. The legislation also allows the Board to issue interim orders where there is a matter of urgency. The majority recommends that those provisions be amended to delete the standard of "urgency" and allow interim orders without qualification. I see no need for such an amendment, given the provisions of the current legislation. If there is no urgency, there should be no need for interim orders. Ordering people back to work without a full hearing when there is no emergency is, in my view, neither appropriate nor sensible as a matter of labour relations policy.

Finally, my recommendations on picketing proposals assume that the new legislation will contain a prohibition against the use of replacement workers. The serious restrictions we are recommending on picketing are only defensible in a legislative scheme that prevents an employer from replacing striking workers. In the absence of such a prohibition there is no reason to depart from the common law standard that allows all operations of an employer to be picketed during a lawful strike or lockout.

If a strike replacement prohibition is not enacted, I recommend (and have set out in my legislative proposal) a provision which would allow employees to picket "secondary" locations of a struck employer when an employer continues operations during a strike or lockout. Despite the surface attraction of such an approach, it has a serious shortcoming compared to a prohibition against replacement workers. It operates as a deterrent only for employers who operate at more that one location. The majority of cases involving the use of replacement workers are single site operations.

## Proposed Section re Picketing

(1) In this section

"Ally" includes a person who, in the Board's opinion, in combination, in concert, or in accordance with an understanding with an employer assists him in a lockout or in resisting a lawful strike.

"Common site picketing" means picketing at or near a site or place where

(a) 2 or more employers carry on operations, employment or business, and

(b) there is a lockout or lawful strike by or against one of the employers referred to in paragraph (a), or one of them is an ally of an employer by or against whom there is a lockout or lawful strike.

(2) A person who performs, supplies, or furnishes services of a nature, or kind, except for a lockout or lawful strike, would be performed, supplied or furnished by the employer, shall be presumed by the Board to be the employer's ally unless he proves the contrary.

(3) A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near

(a) a site or place where a member of the trade union performs works under the control or direction of the employer if the work is an integral part of the employer's operation; or

(b) the place of business, operation or employment of an ally of the employer.

(4) The Board may, on application and after making the inquiries it requires, permit picketing

(a) at or near another site or place which the employer causing a lockout of whose employees are lawfully on strike is using to perform work, supply goods or furnish services for the employer's own benefit that, except for the lockout or strike, would be performed, supplied or furnished at the site or place where picketing is permitted by subsection (3).

(5) Where common site picketing is occurring the Board shall, on application by an interested party, or on its own motion, give directions respecting the picketing to reasonably restrict and confine the picketing to the person causing the lockout or whose employees are on strike or to the place of business, operation or employment of an ally of the employer.

If replacement worker legislation is not enacted, then I recommend the following provision be added as subsection 3(c):

(a) (c) if the employer continues to manufacture, or sell products or provide services which prior to the strike or lockout were provided by the striking or locked out employees, all sites or places of business, operations or employment of the employer including:

(i) any place where an employee of that employer is carrying on the business of that employer, whether the place is owned or controlled by the employer or not; and

(ii) any place that the employer operates or where the employer does anything forming part of the operation of his business.

## Picketing - Vince Ready

I have considered the recommendations made by Tom Roper and John Baigent and the reasons given by each supporting their position. I agree that the existing picketing provisions have brought a level of stability to labour disputes. There is, however, one area of the picketing legislation which, in my opinion, should be amended for the reasons which follow.

The existing provisions of the legislation, which define lawful picketing, are consistent with one of the primary objectives of the legislation: to minimize the effects of labour disputes on persons who are not involved in the dispute. I therefore agree that picketing should be confined to the place where striking employees work and that unaffected employers should be insulated, *as far as possible*, from the labour dispute. As well, I do not draw a distinction between uninvolved employers and separate divisions of the same corporate entity which are not involved in the labour dispute. In both cases, picketing should be confined to the location where employees involved in the labour dispute work. Where separate divisions share a common site, picketing should be confined, to the extent possible, to the division engaged in the strike or lockout: ie. where the employees work.

I also believe that picketing should be confined, in the case of an "ally" to the place where the ally assists the struck employer.

My point of departure from the existing legislation has to do with its resolution of the conflict between the need to protect unaffected parties (either other employers or unaffected divisions of the same employer) and the right of a striking trade union to lawfully picket places where its members work as provided for elsewhere in the section. Currently, the **Act** would require the Board to eliminate picketing in a common site picketing situation where there was no way to confine the pickets to the operation of the struck employer without affecting the uninvolved party. I believe that the Board should have discretion in such circumstances. I propose a section which would place primary emphasis on the protection of uninvolved parties unless the only restriction possible would result in a prohibition of picketing which is otherwise lawful. In that circumstance, I believe that the Board should have the ability to regulate the picketing in such a manner as it deems appropriate.

If replacement worker legislation is not enacted then I believe that the right to picket should extend to an employer's secondary location if bargaining unit work is performed during a strike or lockout. I would therefore, in such circumstances, endorse a "trigger mechanism" such as that proposed by John Baigent.

Lastly, I agree with Tom Roper's proposal that the existing provision authorizing interim orders should signal a broader range of instances when interim orders may be appropriate. This recommendation is consistent with other changes we have proposed to expedite Board proceedings, i.e. alleged unfair labour practice during union organizational campaigns.

I have attached the picketing provisions which I recommend be enacted which includes, as subsection (5), a revised common site picketing provision. I also attach a revised Section 28(5) of the existing legislation, providing for the issuance of interim orders (now Section 133(5)).

## Proposed Section re Picketing

(1) In this section

"ally" means a person who, in the Board's opinion, in combination, in concert or in accordance with a common understanding with an employer assist him in a lockout or in resisting a lawful strike;

"common site picketing" means picketing at or near a site or place where

(a) 2 or more employers carry on operations, employment or business, and

(b) there is a lockout or lawful strike by or against one of the employers referred to in paragraph (a), or one of them is an ally of an employer by or against whom there is a lockout or lawful strike.

(2) A person who, for the benefit of a struck employer, or for the benefit of an employer who has locked out, performs work, supplies goods or furnishes services of a nature or kind that, except for a lockout or lawful strike, would be performed, supplied or furnished by the employer, shall be presumed by the Board to be the employer's ally unless he proves the contrary.

(3) A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation and the site or place is a site or pace of the lawful strike or lockout.

(4) The Board may, on application and after making the inquiries it requires, permit picketing

(a) at or near another site or place which the employer causing a lockout or whose employees are lawfully on strike is using to perform work, supply goods or furnish services for the employer's own benefit that, except for the lockout or strike, would be performed, supplied or furnished at the site or place where picketing is permitted by subsection (3), or

(a) at or near the place where an ally performs work, supplies goods or furnishes services for the benefit of a struck employer, or for the benefit of an employer who has locked out,

but the Board shall not permit common site picketing unless it also makes an order under subsection (5) defining the site or place and restricting the picketing in the manner referred to in that subsection.

(4.1) In subsection (4) "employer" means the person whose operation may be lawfully picketed under subsection (3).

(5) The Board may, on application or on its own motion, make an order defining the site or place at which picketing that is permitted by subsection (3), or that is permitted under subsection (4), may take place and where the picketing is common site picketing, the Board shall restrict the picketing in such a manner that is affects only the operation of the employer causing the lockout or whose employees are lawfully on strike, or an operation of an ally of that employer, unless it is not possible to do so without prohibiting picketing which is permitted by subsection (3) or (4), in which case the Board may regulate the picketing as it deems appropriate.

(6) For the purpose of subsection (6), divisions or other parts of a corporation or firm shall, if they are separate and distinct operations, be treated as separate employers.

## Section 133(5)

Where an applicant or complaint is made under this section the Board may, in its discretion, after giving each party to the matter an opportunity to be heard, make an interim order pending a final resolution of the application or complaint.

## Picketing - Tom Roper

Through written submissions and the oral presentations made to the Sub-Committee, one of the primary concerns of the employer community was that picketing rights not be expanded beyond the current legislation. It was argued that economic sanctions during a labour dispute should be confined to the disputing parties. We were also urged to limit picketing to the particular operation and bargaining unit involved in a labour dispute to preclude the possibility of a striking union picketing other divisions of a struck employer's operation which were not involved in the labour dispute.

In considering whether any changes should be made to the existing legislation in the area of picketing, I return to our terms of reference and to the purposes which we have recommended should provide the basis for the **Code**. Our mandate was to bring forward recommendations for change "... having regard for the need to create fair laws which will *promote harmony and a climate conducive to the encouragement of investment*" (emphasis added). One of the purposes which we have recommended as a fundamental underpinning to the legislation is to *"minimize the effects of labour disputes on persons who are not involved in the dispute."*

Having regard to our mandate and the purposes of the ***Code***, I recommend that the provisions of the existing Section 85 not be altered. I have attached that language and recommend that it be enacted in the new **Code**. I do not agree with John Baigent's proposed changes to the definition of "ally" and definition of a primary site. Whether or not the changes can be described as minor, such tinkering should be avoided. The current language has been interpreted by the Council and the parties understand the limits of primary site picketing and the concept of ally.

There is really no difference between John Baigent and me on the question of secondary picketing. Both of us agree that the picketing legislation should prohibit employees from picketing non-struck "secondary" locations of their employer. In that regard, the regulation of picketing in British Columbia would not substantially differ from other jurisdictions such as Ontario and Alberta. Our primary area of disagreement involves the treatment of allies and separate divisions of the same employer sharing a common site.

Business today operates in differentiated markets which, in many cases, are global in nature. A company may carry on various businesses, in different markets, through operating divisions under the same corporate entity. One of the key competitive issues for business is reliability and customer confidence. Customer confidence is affected by labour relations stability. It is important, therefore, to confine labour disputes as narrowly as possible. Not only are customers influenced by industrial instability, but so too are investors. Investors want to be assured that a labour dispute in one of their operations will not spill over to others.

In my opinion, it is not consistent with that reality to permit a labour dispute at a particular operating division of a company to affect non-struck operations. To use the forest industry as an example, employees on strike or locked out at a pulp mill should not be able to expand their

dispute to sawmills operated by their employer. Nor in my view, should the right to picket unaffected operations be determined by the geographical location of that operation in relation to the pulp mill. It should not matter that the sawmill shares a common location with the pulp mill. Striking pulp workers should be able to picket the place where they work (i.e. the pulp mill) but should not be permitted to picket at places where they do not work (i.e. the sawmill) simply because those operations are adjacent to one another. It is untenable to suggest in this scenario that pulp employees work at both the pulp mill *and* the sawmill and should therefore be entitled to picket both.

Picketing should replicate the scope of the bargaining unit which the striking union represents. Employees who have not chosen to be represented by that union should not be drawn in to the labour dispute by the escalation of picketing to their work location.

It is important to investment in the Province that labour disruption be minimized and, where it occurs, to confine the dispute to the operations "directly involved". I recommend retaining the concept of "separate division" of an employer in the picketing provision. This concept acknowledges the corporate reality that separate and distinct operations may by organized as divisions within a single legal entity for reasons other than labour relations, rather than operated through wholly-owned subsidiaries. It makes no sense to force a particular corporate structure on employers to avoid the consequences of picketing where, regardless of the form of the structure, the operations are separate and distinct. The Ontario Courts and the Labour Relations Board have treated separate divisions of the same employer differently for picketing and other purposes: see, for example ***Domtar Chemicals Ltd. v. Leddy et al*** (1973) 1OR(2d) 367; ***Canadian Pacific Ltd. v. Weatherbee et al***: 1979 26OR (2d) 776; ***M.T.N. Builders Ltd. v. Pacholzczak*** (1988) OJ No. 1946; ***Radio Shack*** [1979] OLRB Rep July 6/89.

Not only is it important that labour disruption be confined to the location of the strike or lockout, it is equally important that unlawful strikes and/or picketing by quickly enjoined. In many cases, the fact that an illegal strike/lockout or illegal picketing is occurring is obvious. Notwithstanding that the existing legislation contains a provision authorizing the tribunal to grant interim orders, the Section is rarely, if ever, used. I therefore recommend an amendment to this provision (see attached Section 133(5)) to reinforce the propriety of issuing interim relief, pending a final resolution of the matter, so long as all parties have an opportunity to be heard. It is in the best interests of harmonious labour relations that a party affected by unlawful job action be granted early relief and not be forced to suffer ongoing damages while the Board schedules a formal hearing.

# Proposed Section re Picketing

(1) In this section

"ally" means a person who, in the Board's opinion, in combination, in concert or in accordance with a common understanding with an employer assist him in a lockout or in resisting a lawful strike;

"common site picketing" means picketing at or near a site or place where

(a) 2 or more employers carry on operations, employment or business, and

(b) there is a lockout or lawful strike by or against one of the employers referred to in paragraph (a), or one of them is an ally of an employer by or against whom there is a lockout or lawful strike.

(2) A person who, for the benefit of a struck employer, or for the benefit of an employer who has locked out, performs work, supplies goods or furnishes services of a nature or kind that, except for a lockout or lawful strike, would be performed, supplied or furnished by the employer, shall be presumed by the Board to be the employer's ally unless he proves the contrary.

(3) A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation and the site or place is a site or pace of the lawful strike or lockout.

(4) The Board may, on application and after making the inquiries it requires, permit picketing

(a) at or near another site or place which the employer causing a lockout or whose employees are lawfully on strike is using to perform work, supply goods or furnish services for the employer's own benefit that, except for the lockout or strike, would be performed, supplied or furnished at the site or place where picketing is permitted by subsection (3), or

(b) at or near the place where an ally performs work, supplies goods or furnishes services for the benefit of a struck employer, or for the benefit of an employer who has locked out,

but the Board shall not permit common site picketing unless it also makes an order under subsection (5) defining the site or place and restricting the picketing in the manner referred to in that subsection.

(4.1) In subsection (4) "employer" means the person whose operation may be lawfully picketed under subsection (3).

(5) The Board may, on application or on its own motion, make an order defining the site or place at which picketing that is permitted by subsection (3), or that is permitted under subsection (4), may take place and where the picketing is common site picketing the Board shall restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike, or an operation of an ally of that employer.

(6) For the purpose of subsection (6), divisions or other parts of a corporation or firm shall, if they are separate and distinct operations, be treated as separate employers.

## Section 133(5)

Where an applicant or complaint is made under this section the Board may, in its discretion, after giving each party to the matter an opportunity to be heard, make an interim order pending a final resolution of the application or complaint.

# Appendix 5

## Replacement Worker Prohibition - John Baigent

I recommend the enactment of a prohibition against the use of replacement workers ("anti-scab legislation") during a legal strike or lockout.

Presently, replacement worker legislation has been in place in Quebec since 1978 and similar legislation is before the Ontario Legislature.

In our visit to Quebec both management and union officials advised us that their worker replacement legislation has worked well and reduced the incidences of picket line violence. In fact, the prohibition was strengthened in 1987 after initial "fears that (the law) would hamstring employers and scare away investment proved unfounded" (*Globe & Mail*, September 7, 1992). The underlying assumption in the Quebec experience is worth emphasizing at the outset. In a mature collective bargaining relationship the parties recognize that the use of replacement workers does not solve collective bargaining issues; it simply exacerbates them.

The rationale for prohibiting the use of replacement workers during a work stoppage is straightforward. Labour legislation is designed to encourage collective bargaining. When collective bargaining reaches an impasse the theory behind the legislation is that the economic hardships suffered by both sides will force a compromise. When an employer continues to work during a strike or lockout the dynamic of collective bargaining is frustrated and the employer's incentive to negotiate is removed. Beyond that, work stoppages are lengthened and picket line violence is often inevitable as employees witness replacement workers filling "their" jobs and removing pressure from their employer to settle the dispute. A prohibition against the use of replacement workers is consistent with a social policy that encourages collective bargaining; the use of strikebreakers is inconsistent with such a policy.

In those areas of the economy where extensive job training is not necessary the possibility of an employer working through a strike or lockout has another less obvious result. It provides a disincentive for employees to join unions. Workers who know they can be replaced easily during a strike are less likely to opt for unionization.

The argument against replacement work legislation usually notes that there is no parallel provision prohibiting employers working during a work stoppage. That observation is correct but the fact is that there are few employment options for a person engaged in a strike of uncertain length in an economy where the unemployment rate hovers at 10%. Usually only a small minority of striking workers are able to find alternate employment and there is no practical way of enforcing a prohibition against that occurring.

It may also be argued that the provisions we have recommended for the settlement of first contracts will eliminate the necessity for a prohibition against the use of replacement workers. That is because replacement workers are most commonly used in disputes following a first set of negotiations. However, recent years have witnessed the use in British Columbia of replacement workers by employers with long standing collective bargaining relationships (Lafarge Cement, Canada Post). It should also be noted that the current first contract provisions have been in place in British Columbia for 21 years and have done little to eliminate the use of replacement workers. Improving those first contract

provisions is not likely to change that reality. It is also argued that a prohibition against the use of replacement workers will deter new investment. That speculation is inconsistent with the Quebec experience. It also overlooks the enduring damage to labour relations which arises out of the use of strikebreakers.

The message behind a prohibition against the use of replacement workers is one that we should not hesitate to send. And that message is that if an employer has a dispute with its employees that dispute must be settled at the bargaining table — not by end-running the collective bargaining process.

I have attached, as a separate Appendix, draft provisions for enactment of a prohibition against the use of replacement workers. Those provisions would allow employers to use management personnel from the struck and non-struck portions of the operations during a legal strike or lockout.

If a prohibition against the use of replacement workers is enacted, the provisions in the **Industrial Relations Act** dealing with professional strikebreakers (Sections 1(1) and 3(3)(d)) should be repealed.

# Replacement Worker Provision

(a) During a lockout or strike authorized by this Code. other than a strike or lockout in which there has been a designation of essential services under Part 6. an employer is prohibited from:

(a) using the services of an employee in the bargaining unit that is on strike or locked out:

(b using the services of any person. whether paid or not. who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins

(i) to perform the work of an employee in the bargaining unit that is on strike or locked out: or

(ii) to perform the work ordinarily done by a person who is performing the work of such an employee:

(c) using the services of an employee. whether paid or not. who ordinarily works at another of the employer's places of operations:

(d) using the services of an employee. whether paid or not. who is transferred to a place of operations in respect of which the strike or lockout is taking place. if he or she was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins:

(e) using the services of a person. whether paid or not. who is employed. engaged or supplied to the employer by another person or employer.

(2) An employer shall not require any person who works at a place of operations in respect of which the strike or lockout is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the consent of the person.

(3) No employer shall:

(a) refuse to employ or continue to employ a person:

(b) threaten to dismiss a person or otherwise threaten a person:

(c) discriminate against a person in regard to employment or a term or condition of employment: or

(d) intimidate or coerce or impose a pecuniary or other penalty on a person. because of the person's refusal to perform any or all of the work of an employee in the bargaining unit that is on strike or is locked out

because of the person's refusal to perform any or all of the work of an employee in the bargaining unit that is on strike or locked out.

# Replacement Worker Prohibition - Vince Ready

There is a significant difference of opinion in the various sectors of the community — big business, labour, small business and the investment community — regarding the use of replacement workers during strikes.

The employer community views the notion of anti-replacement worker legislation as tampering with the balance of power in collective bargaining. Employers claim that anti-replacement legislation removes the employers' power and right to operate during a collective bargaining dispute, thus giving labour the advantage in the dispute. The employer community argues such legislation is unbalanced as there is no corresponding bar to employees seeking work to replace income during a strike. It is also stated by the business community that the introduction of replacement worker legislation will have an adverse impact on investment in the Province.

On the other hand, the trade union movement views the right to strike as a fundamental right under labour law and under the Constitution of the land. The use by employers of replacement workers during a strike is viewed by labour as a declaration of war on the trade unions' legitimate right to strike. Striking is their power to bring economic pressure on an employer during a labour dispute. It is also argued vociferously by labour that the use of replacement workers during a legal strike results in excessive violence and, in some cases, injury and/or death, on picket lines. As well, the trade union movement argues that the use of replacement workers, or "scabs" as they are commonly described, prolongs the length of labour disputes, poisoning the relationship between the union and the employer. For those reasons, labour argues strongly in favour of anti-replacement legislation. There is no doubt that the use of replacement workers during a labour dispute elevates a dispute in the public arena — largely due to the accompanying violence which causes headlines and adverse publicity provincially, nationally and internationally.

While I have no trouble supporting the concept of anti-replacement worker legislation as a matter of public policy I have reviewed the issue with a view to accommodating the interests of all parties.

I have looked for a solution which is in accord with the underlying principles and purposes of our labour legislation. These are:

(1) to promote and encourage collective bargaining;

(2) to encourage cooperation and codetermination in the workplace;

(3) to confine work disputes to the parties as much as possible; and

(4) to facilitate resolution of disputes with mediation.

In order to provide a balance to the use of replacement workers during a legal strike, I recommend amendments to be incorporated into legislation, as follows:

In the event a legal strike is in force and the employer uses replacement workers, either party may request that a special mediator be appointed by the Minister of Labour. Upon appointment the special mediator shall meet immediately with the parties to:

(a) examine and define the issues in the dispute, including any underlying reasons giving rise to the dispute;

(b) assist the parties to resolve the dispute;

(c) if necessary, submit a written report to the Minister of Labour within 15 days (or longer, if mutually agreed by the parties) of the date of the appointment.

The special mediator's report shall include a statement of:

(i) any underlying issues giving rise to the dispute;

(i) the issues in the dispute;

(i) recommendations of settlement on the terms of a collective agreement or a method by which all outstanding matters may be resolved, or a combination of both of the above.

The Minister shall act upon the report of the special mediator within 15 days of receipt thereof in a manner the Minister deems appropriate or the Minister may order that the parties be bound by the report of the mediator or may refer the dispute to binding arbitration.

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"Replacement workers" would have to be defined in the legislation and could be defined in terms of those persons who would be prohibited from working during a labour dispute, in John Baigent's proposal.

I respectfully submit that this method of addressing the use of replacement workers in a labour dispute will serve the broader purposes of our labour legislation and, therefore, of the Province. This approach would allow an independent and neutral person to examine the exigencies of each dispute while examining the underlying issues. The threat of imposition of an agreement will, in some cases, act as a deterrent to the use of replacement workers. In those cases where replacement workers are used this mechanism should ensure that those disputes are resolved quickly. Finally, this method will be responsive to the needs of small business in that the special mediator will be directed to consider the underlying issues and will have the flexibility to fashion a resolution or propose a method of resolution which can accommodate their concerns.

## Replacement Worker Prohibition - Tom Roper

The argument most strongly advanced for strike replacement legislation is that it eliminates a potentially volatile scenario which can lead to picket line violence. Workers, who have the lawful right to withdraw their services to force collective bargaining demands, are enraged by replacement workers crossing the picket line to take their jobs. Advocates of this type of legislation point to Quebec and argue that picket line violence has been all but eliminated because of the prohibition of the use of hired strike replacements.

Critics of strike replacement legislation would argue that whether or not picket line violence occurs is a decision made by the pickets, not by the employer, and that the prospect of unlawful conduct on the part of the union or its supporters is not a sufficient reason to restrict lawful conduct on the part of the employer. Others would say that while the stated objective of strike replacement legislation may be laudable, it masks the real purpose or effect of the legislation which is to alter significantly the balance of power in a labour dispute. There are few issues in labour relations that evoke such strongly held positions as strike replacement legislation.

In addressing this question in terms of the British Columbia experience, one must assess whether the concerns advanced by the legislation's proponents are supported experientially or whether those concerns are outweighed by the competing arguments against the legislation.

I am of the view that the arguments in support of strike replacement legislation are not supported by the history of labour relations in British Columbia and are far outweighed by the imbalance in collective bargaining which such legislation creates.

Most large employers in British Columbia do not attempt to operate during a labour dispute. In many industries, the reliance of a struck employer on unionized suppliers, transportation companies and customers makes continued operations impractical. However, an employer's decision to operate during a strike may be driven by economic necessity. The employer may reasonably believe that a shutdown of any duration could spell the demise of the business. Even in those cases where an employer attempts to continue operations during a labour dispute, we have not witnessed picket line violence as has occurred in other jurisdictions. This is probably due to the sanctity of the picket line in British Columbia. A picket line in British Columbia acts as an "iron fence" to trade unionists. It would be unusual in British Columbia to find some striking employees crossing the picket line to return to work or to find unionized employees of suppliers or customers crossing picket lines. Our Province does not have the same history of picket line violence as did Quebec when strike replacement legislation was introduced, or Ontario where similar legislation is proposed.

Strike replacement legislation was introduced in Quebec in 1978 a week after armed security guards opened fire on striking workers at Robin Hood Flour, injuring a number of the pickets. Simply stated, the picket line violence argument does not have a factual foundation in B.C. and provides no justification for implementing strike replacement legislation in this Province.

A strong case can be made that strike replacement legislation creates an unfair imbalance in collective bargaining. The theory of collective bargaining is that both sides may invoke economic sanctions to buttress their bargaining position. The union could call a strike and withdraw the labour of its members. A picket line could be established to persuade others from doing business with the struck employer. The employer, on the other hand, is free to attempt to withstand the strike by continuing to operate. It can do so utilizing management or supervisory employees, or by hiring other employees to work. The picket line may persuade some not to do business with the struck employer, but may not persuade others. Thus, there is no guarantee that a strike will, or will not, succeed. Much will depend on the economic strength of the striking employees and the economic strength of the employer. Just as the employer is free to attempt to operate during a strike and maintain revenue, striking employees are free to obtain alternate employment to replace their lost income. While many employers do not attempt to operate during a strike, the mere prospect that they may do so can be an important strategic factor in collective bargaining.

Aside from the shift in bargaining power, strike replacement legislation puts a tremendous amount of power in the hands of a trade union over the employer's ability to remain competitive or, indeed, to remain in business. This is particularly so in the case of small business. A large trade union, with a sufficient strike fund to support striking employees, may take a strike against an employer to force demands which are in excess of the employer's ability to pay. If the employer cannot operate its business during the strike it will have only two choices: allow the strike to force it out of business, or accede to the union's demands and die a slow death.

Paul Weiler, in ***Reconcilable Differences, New Directions in Canadian Labour Law*** (Carswell, 1980), describes this inequality in bargaining power in the following way:

> *"Take another case, one which I have seen several times. The union organizes the employees of a small employer, promising the generous agreements signed by the major firms in that industry. The employer says it cannot possibly pay those rates and stay in business. The union's response is that if this firm could only stay in business by undercutting the standard contract rates, then the firm should not survive. Thus this union calls the strike (again one assumes by a majority vote), places the striking employees on jobs elsewhere (perhaps with its major employers who also do not like these marginal competitors) and sits back to wait for the struck employer to cave in. I would not advocate, both for reasons of principle and administrative feasibility, any restriction on the right of strikers to seek work elsewhere. By the same token I do not believe the law should prohibit employers in a case such as that from hiring replacements who are willing to work at rates and conditions which they consider acceptable and the employer believes are economically feasible." (at page 77).*

In Weiler's view, which I share, "...the Quebec law [prohibiting strike replacements] strays much too far from the competitive economic struggle which, in the final analysis, does underlie our system of free collective bargaining." (at page 78).

Those who advocate strike replacement legislation do not propose any restriction on striking employees from working elsewhere. Thus, while the striking employee can seek to

replace his or her income with other work, the strike replacement legislation would prohibit the employer from attempting to do the same.

In terms of attracting investors to the Province, there is the very real risk that perception may become reality if strike replacement legislation is enacted. If investors believe that once unionized, an employer would be unable to operate its business if the union struck over demands which the employer believed were uneconomic, they may think twice about investing in B.C. They may well question making a large capital investment in B.C. if a union could potentially put them out of business.

When one considers the impact on investment, the inherent inequality of bargaining power which results from strike replacement legislation and the fact that our Province has not experienced the same history of picket line violence as other jurisdictions, there is very little justification for enacting such legislation.

We are now witnessing a heated debate in Ontario over the government's intention to implement changes to that Province's labour laws. One of the primary issues in the debate is over the government's stated intention to introduce strike replacement restrictions. For reasons set out above, I do not believe that this Province needs strike replacement legislation as a matter of labour relations policy, nor does this Province need the animosity and division between labour and management which this legislation generates. Accordingly, it is my recommendation that the government not implement strike replacement worker legislation.

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